May 1-78. Arg'd

Argued with No. 8

7 Otto p 692
Oct T 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~531.~~ 239

THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK ET AL. APPELLANTS,

VS.

ABNER C. SHOEMAKER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 14, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 531.

THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK ET AL., APPELLANTS,

VS.

ABNER C. SHOEMAKER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Original Bill.* Filed March 2, 1874.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA, ALEXANDER R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, John B. Blake, constituting and composing the Board of Public Works of the District of Columbia.
} 3,616. Equity Docket 13.

To the Supreme Court of the District of Columbia, holding an equity court for said District.

Abner C. P. Shoemaker, a resident of the county of Washington, in the District of Columbia, brings this his bill against the District
of Columbia, and Alexander R. Shepherd, Henry A. Willard,
2 James A. Magruder, Adolf Cluss, and John B. Blake, constituting and composing the Board of Public Works of the District of Columbia; and thereupon your orator complains as follows:

1. The defendant, "the District of Columbia," is a body politic and corporate, under and by virtue of the act of Congress of the United States, approved February 21, 1871, entitled "An act to provide a government for the District of Columbia," and the defendants, Alexander R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, and John B. Blake, are residents of the said District of Columbia, and constitute and compose "the Board of Public Works" of said District, created and provided for by the 57th section of the said act, and appointed in pursuance thereof.

2. Your orator is, and at the time of the happening of the several
grievances hereinafter complained of was, seized and pos-
3 sessed, in fee simple, of a certain large piece, parcel, or tract
of land and premises situated and lying in the said county of Washington and District of Columbia, adjacent to and bounding upon the line of the 7th-street road, between the street that bounds the city of Washington and the boundary line of said District.

3. Your orator being so as aforesaid seized and possessed was heretofore, to wit, on the eighth day of April, A. D. 1873, notified in writing by the said defendants, "the Board of Public Works," that his said property, having a front of 2,819.70 feet on the said 7th-street road, had been assessed (by the said defendant) for and on account of the special improvement of said road at the rate of ninety-seven $\frac{246}{1000}$ cents per front foot, and that unless the said assessment should be paid within thirty days from the date of service
of said notice the said defendants would immediately there-
4 after issue certificates of indebtedness against the property
assessed as aforesaid, which certificate should bear interest

until paid at the rate of ten per centum per annum, and, until paid, the assessment and certificate should remain and be a lien upon the property on or against which they shall have been issued. And that if not paid within one year, the said defendant, "the Board of Public Works," would proceed to sell the property against which the assessment and certificate exist, as per act of legislative assembly, approved August 10, 1871, as will appear, reference being had to said notice herewith filed, marked exhibit "A," and prayed to be taken as part hereof.

4. Your orator further shows that thereafterwards, to wit, on the fifth day of November, A. D. 1873, the said defendant, "the
5 Board of Public Works," submitted their annual report, as
required by the aforesaid act of Congress, and therein exhibited a certain tabular statement of assessments, purporting, among other things, to furnish the total cost of the improvement made upon said 7th-street road from Boundary street to the district line, and the several proportions thereof chargeable respectively to the "general fund," "to property holders," and "to the United States," whereby it appears that the whole expenditure for and on account of said improvement made by authority of the said "Board of Public Works," was one hundred and seventy-four thousand two hundred and sixty-eight dollars and forty-four cents ($174,268.44), from which sum there is deducted the amount of thirty-three thousand five hundred and fifteen dollars and fifteen cents ($33,515.15), alleged to be chargeable to the United States, re-
6 ducing the said first-mentioned amount of $174,268.44 to
the sum of one hundred and forty thousand seven hundred and forty-five dollars and twenty-six cents ($140,748.26), the one-third of which, to wit, the sum of forty-six thousand nine hundred and eighteen dollars and forty-two cents ($46,918.42) is assessed upon the private property abutting upon said road, between the aforesaid Boundary street and the said district line, amounting as alleged to the aforesaid sum of ninety-seven $\frac{246}{1000}$ ($97\frac{246}{1000}$) cents per front foot, as will appear, reference being had to said "tabular statement of assessments" contained in said report at the eighty-fourth page thereof; of which said report a printed copy is herewith filed, marked exhibit "B."

5. Your orator is advised and so represents, that in and by
7 the thirty-seventh section of the aforesaid act of Congress,
entitled "An act to provide a government for the District of Columbia," approved February 21st, 1871, it is provided that the said defendant, "the Board of Public Works," shall have no power to make contracts to bind said district to the payment of any sums of money, except in pursuance of appropriation made by law, and then only to the extent and within the limit of such appropriation, and that the power of the said defendant to assess upon the property adjoining and to be especially benefited by the improvements authorized by law, and made by them, for the cost thereof, is lim-

ited to a reasonable proportion of said cost, not exceeding one-third thereof, to be collected as all other taxes are collected, and that said defendant is vested with no power to assess any portion of the cost of said improvements upon property adjoining and espec-
8 ially benefited, save and except such as is conferred upon them by the said act of Congress and the acts of the legislative assembly of the District of Columbia enacted in pursuance thereof.

And your orator avers the truth to be that the only appropriation for the special improvement of the said Seventh-street road, from said Boundary street to the said district line, existing at the time said improvement was commenced, or at any time since, was an appropriation of twenty-five thousand dollars ($25,000) made by an act of the legislative assembly of said district, approved July 10th, 1871, entitled "An act making appropriation for improvements and repairs in the District of Columbia, and providing for the payment thereof," together with the plan of improvement submitted to said legislature by the Board of Public Works of
9 said district in its communication bearing date June 20th, 1871, referred to in said act and made part thereof, a copy of which said plan of improvement is herewith filed, marked exhibit "C," whereby, reference being thereto had, it will appear that the cost of improving said road was estimated at the sum of two thousand five hundred dollars ($2,500), which said estimated sum, as your orator is advised and believes, is a misprint for twenty-five thousand dollars ($25,000) aforesaid.

And your orator further shows that, by the first section of the said act of the legislative assembly of July 10th, 1871, hereinbefore referred to, the sum of money therein appropriated for the improvement and repairs of the streets, avenues, alleys, and roads in the District of Columbia, and for the construction of sewers,
10 bridges, and other public works therein, was required to be expended "as fully as may be practicable and consistent with the public interests," in conformity with the said plan of improvement submitted to the said legislature by the Board of Public Works as aforesaid; and that, by the second section thereof, it is expressly enacted that in no case shall the said board enter into a contract for any work or improvement the cost of which shall exceed the cost estimated for in its aforesaid plan less twenty per centum of said estimate. And your orator further shows that the said sum of twenty-five thousand dollars ($25,000), the total estimate as aforesaid for the improvement of said Seventh-street road from the Boundary street to the district line as aforesaid, less twenty per centum, amounts to the sum of twenty thousand dollars ($20,000), and no more.

11 Wherefore your orator is advised and so charges, that said improvements upon said road so as aforesaid constructed under authority of the defendant, the Board of Public

Works, at a cost of more than seven times the amount appropriated as aforesaid for the improvement of said road, was not authorized by law. And the said Board of Public Works had no lawful authority or power to assess any part of the cost thereof on the property adjoining thereto of your orator.

6. Your orator is further advised and believes, that if the improvement so as aforesaid made by the defendant, the board of works, upon said Seventh-street road was not wholly and entirely unauthorized by law, yet in so far as and to the extent that the cost thereof was in excess of an appropriation justly and legally
12 applicable thereto, it was not authorized by law. And the
property of your orator adjoining and abutting as aforesaid upon said road is not legally chargeable with any part of the cost of said improvement beyond a proper proportion of the one-third of so much thereof as was made in pursuance and within the limit of such appropriation.

7. Your orator further shows, upon information and belief, that his aforesaid property, fronting and abutting upon said Seventh-street road, has been assessed by said defendant, the Board of Public Works, with a proportion of the cost of improvement to which said property so assessed is not adjoining, to wit, improvement in front of and adjoining churches and school property, which said improvement he is advised and believes is wholly chargeable to the
13 general fund, and no part thereof is chargeable to private
property. But how much has been so illegally charged and assessed upon your orator's said property he does not know, and cannot ascertain without a discovery from the Board of Public Works.

Wherefore your orator calls upon the said defendant, the Board of Public Works, for a full and particular discovery as to what proportion of said total amount of one hundred and forty thousand seven hundred and forty-five and twenty-six cents ($140,745.26), a proportion of the one-third whereof is assessed upon the private property of your orator as aforesaid, was expended for improvement in front of church and school property.

8. Your orator is further advised and believes that since the receipt by him of the aforesaid notice, herewith filed, marked ex-
14 hibit "A," the said defendant, the Board of Public Works,
in derogation of your orator's rights in the premises, have caused to be prepared and issued a certificate of indebtedness against his aforesaid property for the amount so as aforesaid wrongfully charged against him on account of said improvement, and that said board being invested by the said act of Congress with general power to make assessments, and by the said act of the legislative assembly with the power to issue certificates of indebtedness, and the said assessment and certificate being, as the plaintiff believes, apparently valid on their face, the said certificate, so as aforesaid issued under color of law, operates to throw a cloud upon the title of your orator to his aforesaid property.

9. And your orator is further advised, and so represents,
15 that the said defendant, the Board of Public Works, by rea-
son of the general power conferred upon them by the said
act of the legislative assembly to make assessments based upon their
statement of the cost of improvements when the same shall be com-
pleted, have proceeded in making the aforesaid assessments appa-
rently within the scope of their powers; that their proceedings were
upon their face valid, and that said assessment and the said certifi-
cate of indebtedness create and are a valid lien upon your orator's
said property; nevertheless your orator avers and is ready to prove
that, notwithstanding such apparent validity, such proceedings were
wholly void by reason of matter which did not appear upon the face
thereof, or of the record of said assessment, and which can only be
established by evidence extrinsic thereto.

16 10. Your orator is further advised and believes that the
said certificate of indebtedness so as aforesaid wrongfully is-
sued against his said property is in character transferable, and he
is informed that assignment thereof has been made by the said de-
fendant, the Board of Public Works; and he is further advised
that by virtue of the third section of the act of the legislative as-
sembly, approved August 10th, 1871, entitled "An act prescribing
the mode of assessment for special improvements, and providing
for the collection thereof;" the said certificate of indebtedness bears
interest until paid at the rate of ten per centum per annum, and that
until paid the amount so as aforesaid wrongfully assessed against his
property, together with said certificate, remains and is a lien
17 thereon; and that if said amount so as aforesaid assessed
shall not be paid within one year from the expiration of
thirty days after he has received said notice, the said board will,
upon the application of the holder of the said certificate of indebted-
ness, proceed to sell your orator's said property, or so much thereof as
may be necessary to pay the amount so as aforesaid assessed against
it, and that a deed will thereupon be given by the governor,
countersigned by the secretary of the District of Columbia, which
deed will be deemed and held to be a good and perfect title to said
property.

Wherefore your orator submits that, in consideration of the
premises, the said defendant, the Board of Public Works, are bound
in equity and good conscience, and ought to be required to
procure the said certificate of indebtedness, so as aforesaid
18 issued against his said property under color, but really with-
out authority of law, to be delivered up to them by the
holder or holders thereof, and the same thereupon to cancel.

11. Your orator is further advised, and so charges, that in respect of the aforesaid improvement the legislative assembly of the District of Columbia has wholly failed to execute the discretionary power conferred upon it by the aforesaid act of Congress to determine what should have been a reasonable proportion, not exceed-

ing one-third of the cost thereof, to be assessed against the property adjoining and especially benefited by said improvement, and that he cannot be charged with the payment of any tax or assessment which has not received the sanction and approval of the said
19 legislative assembly. And he is further advised and represents that the said legislative assembly has failed furthermore to prescribe any rule or principle upon which said assessment should be made upon the adjoining property; but he avers the truth to be that the assessment upon his property aforesaid was made arbitrarily and according to the number of front feet, without regard to any other consideration, whereby great detriment has been occasioned your orator; and that no notice was given to your orator until after said assessment had been made.

12. And your orator is willing, and hereby offers to pay his proportion of the sum appropriated as aforesaid by law for said improvement, and for which contracts were authorized to be made, if the same be justly payable, as soon as such appropriation shall be legally ascertained.

20 *Prayer.*

To the end, therefore, that the said District of Columbia, and the said Alexander R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, and John B. Blake, constituting and composing the Board of Public Works of said District, may be made defendants to this bill, and may answer the same as fully and particularly as if thereto specially interrogated.

And that the said assessment against the property of your orator, fronting on the Seventh-street road, between Boundary street and the district line, and the certificate of indebtedness issued in pursuance thereof, may be declared and decreed to be without authority of law and void, and of no validity whatever to charge your orator's said property with any lien.

And that the said defendant, the Board of Public Works, be required as aforesaid to withdraw and cancel the said certifi-
21 cate of indebtedness.

And that in the meantime said Board of Public Works be restrained by the order and injunction of this honorable court from proceeding to sell your orator's said property, or any part thereof, at the instance of any holder of said certificate of indebtedness.

And that if the said property is, in the judgment of this honorable court, chargeable with any part of the amount charged in said assessment, then that said portion may be ascertained in such manner as to the court shall appear right, and that upon payment thereof the said property may *be* decreed to be discharged of and from any further claim on account of said assessment.

And that your orator may have such other and further relief in the premises as to this honorable court shall appear just and equitable.

22 May it please the court, the premises considered, to grant unto your orator the United States writ of subpœna, to be directed to the said defendant, the District of Columbia, and the said defendants, Alexander R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, and John B. Blake, constituting and composing the Board of Public Works of said District, commanding them, etc. And also the writ of injunction against the said defendant, the Board of Public Works, enjoining and restraining them as aforesaid. And your orator will ever pray, etc.

ABNER C. P. SHOEMAKER.

T. A. Lambert, *Solicitor.*

I do solemnly swear that I have heard read the bill by 23 me subscribed, and know that the contents thereof and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

ABNER C. P. SHOEMAKER.

Subscribed and sworn to before me, this 2d of March, 1874.

R. J. MEIGS, *Clerk.*
By L. P. WILLIAMS, *Ass't Clerk.*

Exhibit "A." Filed Mar. 2, 1874.

Book 1. Corrected. Folio 294.

Board of Public Works, District of Columbia,
Assessor's Office,
Room 20, Morrison Buildings, 4½ Street,
Washington, *April* 8, 1873.

A. C. P. Shoemaker.

You are hereby notified that your property has been as-
24 sessed for grading and graveling 7th-street road, said property having a front of 2,819.70 feet on said road, at $\$0.97\frac{246}{1000}$ per front foot, $2,742.04.

Received payment,

——— ———,
Assessor and Collector.

Unless the above assessment be paid within thirty (30) days from the date of service of this notice, the Board of Public Works will immediately thereafter issue certificates of indebtedness against the property assessed as aforesaid, which certificate shall bear interest until paid at the rate of ten per centum per annum, and until paid the assessment and certificate shall remain and be a lien upon the property on or against which they shall have been issued. If not paid within one year the Board of Public Works will pro-
25 ceed to sell the property against which the assessment and the

certificate exist, as per act of legislative assembly approved August 10, 1871.

GEORGE W. BEALL,
Assessor and Collector.

N. B.—If this property no longer belongs to you, please direct this circular to the present owner, or return it to this office with name of the present owner.

Payments to be made in this office. Office hours from 9 a. m. to 3 p. m.

26 *Exhibit "C."* Filed Mar. 2, 1874.

WASHINGTON, *February* 3, 1872.

SIR: In reply to your requests of January 31 I have to submit the following:

1. The information relative to the improvement of F street is contained in the accompanying letter of William Forsyth, first assistant engineer of the Board of Public Works, dated February 2. A copy of the petition of Alexander and A. Ross Ray, Wm. B. Webb, and others for the laying of a concrete pavement is also enclosed.

2. The plan for the improvement of the District is that submitted by Mr. Forsyth to the board June 20, 1871, a printed copy of which is furnished you. The schedule of prices adopted by the board is also inclosed.

27 3. A statement of the contracts entered into by the board is herewith furnished, and also a printed form of the contract used.

4. A specification is inclosed of the work upon improvements performed without a written contract.

6. The accompanying letter of Mr. B. D. Carpenter, second assistant engineer of the board, dated February 2, furnishes the information asked for relative to the improvement of Seventh street from Boundary street to the district line. I also inclose a copy of a communication to the board, dated June 28, 1871, from S. Wolf, President of the Washington Schuetzen Verein, relative to the dangerous condition of Seventh street.

This estimate of the plan of June 20, 1871, for the improvement of Seventh street, printed $2,500, is a misprint for $25,000.

Very respectfully,
WM. E. CHANDLER,
Counsel for the District Government.

Hon. A. G. RIDDLE,
Counsel for the Memorialists.

28 To the Council of the District of Columbia.

In compliance with a resolution adopted by your honorable body on the 16th instant, the Board of Public Works has the honor to transmit a statement of the improvements which it recommends, and the estimated cost thereof, and to submit for your consideration a bill providing the necessary means for the execution of the work.

The statement, it will be seen, contemplates permanent improvements in every portion of the District of Columbia, and comprises almost every street and avenue in the cities of Washington and Georgetown as well as all the roads in the county. It provides for the improvement of the streets in the central part of Washington by lessening the width of the carriage-ways and paving and sewering them, and also embraces the building of a main sewer
29 from Eighth street northwest to Rock creek; the sewerage
of the valley of the Tiber, and the paving and macademizing of a large number of streets in the less-thickly populated sections of the city. It is estimatnd that $4,358,598 will be the proportion of the expenses to be borne by the treasury of the district in making these improvements, and as, in the opinion of the board, that amount will be sufficient to complete them, the necessity of annual appropriations, so far as the prosecution of these works is concerned, will be obviated by the passage of the bill herein respectfully recommended.

Were it required that this seemingly large amount should be paid within a single year, grave apprehensions might justly arise as to the ability of the people to meet so heavy a burden. It is,
30 however, proposed in the bill that the money shall be raised
by a loan extending over a period of twenty years; and it will be found to contain careful provision both for the payment of the interest and the extinguishment of the debt. It is believed by the board that should the bill become a law and proper measures be taken to protect our credit, there will be no difficulty in disposing, at a satisfactory rate, of the bonds which it is proposed to issue.

The aggregate of the accompanying statement may at first appear extravagant, but it should be remembered that in Washington alone the city's proportion of the work done upon the streets during the past two years reached nearly a million and a half of dollars. To dispel any suspicion of extravagance in its views or aims, the board need only invite a comparison of the work
31 accomplished within that time at so heavy an outlay with
the comprehensive plan of improvements which it proposes to inaugurate and complete within the limits of the estimates.

It is, perhaps, proper to explain, in this connection, that these estimates are based upon the average rates paid for similar improvements by the city of Washington, less twenty per cent. deducted in view of the plan proposed by the board to pay cash for all work that may be done under its direction. It was, to a great extent, customary, under the old system, to commence and complete an improvement in advance of any arrangement for the payment of the cost. Contractors were compelled to consider this fact, and also,

that as the corporation was rarely in funds to meet its obli-
32 gations, the assessments, when made, would not yield more
than eighty cents on the dollar. To meet this condition of affairs they generally added to their estimates twenty per cent.

Another objectional practice which in some instances prevailed prior to the organization of a government for the District was that of excessive measurements in computing the amount of work done. This will be prevented by the establishment in advance of the exact quantities of each kind of work to be executed, and thus when a contract is entered into the entire amount to be paid can be specifically determined. No increase can therefore be allowed, as by the terms of the organic act even the legislative assembly is prohibited, after a contract has been made, for granting or authorizing "extra allowance" or "compensation" to the contractor.

33 Heretofore no improvement made could be considered a permanency, and in numerous instances property assessed for work, which it was supposed would accomplish the object desired, has in a short time been reassessed to remedy some real or fancied defect in the plans first executed. The system adopted by the board contemplates that a street having once been improved, the property-holders will not be required to meet another assessment for that particular object, and that the only expense thereafter will be for ordinary repairs that may from time to time become necessary.

It will be seen upon examination that the statement embraces a thorough system of improvements which may require years for completion. The board is of the opinion that the interests of
34 the District imperatively require that the necessary appro-
priations should at once be granted, in order that operations may be commenced without delay. Contracts for material can then be so regulated as to thwart monopolies and improper combinations, and the projected improvements may be prosecuted in such connection, the one with the other, as to accomplish the largest results for the least outlay.

Under the municipal governments heretofore existing about three hundred thousand dollars were yearly collected and expended as ward and county funds, for casual repairs and local improvements, and in addition a large amount was collected and applied from the general fund. The plan of the board contemplates the completion of a grand system of improvements without one dollar of in-
35 creased tax upon the property-holders of the District. In-
deed, the amount of taxation necessary to pay the interest upon the proposed bonded debt, and to provide a sinking fund for the extinguishment of the principal, will not cost annually the sum heretofore expended as ward and county funds for mere casual repairs, and which, as thus applied, was virtually thrown away.

Regarding the effect of this plan upon the general taxes of the District, the board respectfully submits that to pay interest on $4,358,598 in bonds will require in currency $305,101.86. Add the

estimated premium on gold for the next one or two years at ten per cent., and the amount required to pay the interest will be $335,611.86. An addition of three per cent. on the principal in
36 currency (which will be more than sufficient to retire the gold bonds) gives $466,368 as the amount which will have to be raised by taxation to meet yearly the interest and principal of the proposed loan. Of course, with each year the debt will decrease, and in a brief period the rate of taxation will be much less than that stated.

The board is satisfied upon careful consideration that as a rule the value of property in the District will not warrant the general introduction of wood or other expensive pavements, and that if at all used they should be confined to a few of the principal avenues of communication. It is believed that road-beds of stone, more durable and equally free from dust and mud, can be constructed at less cost than has usually been paid for the most ordinary kind of stone pavements.

37 The board begs to state in conclusion, that a thorough investigation of the subject convinces it that sound policy demands the immediate inauguration of a comprehensive and stable system of improvements, and that if its recommendations should be adopted by the legislative assembly, property will be enhanced in value to an extent that will more than meet the expenses to be incurred, the seat of the national government be rendered more attractive to the people, and the proportionate rate of taxation be largely reduced as compared with that which has heretofore prevailed.

H. D. COOKE.
JAMES A. MAGRUDER.
ALEX. R. SHEPHERD.
A. B. MULLET.
S. P. BROWN.

Washington, D. C., June 20, 1871.

38 Filed March 2, 1874.

Estimated cost of carrying into effect the proposed improvements, exhibited on the accompanying plans, recommended by the Board of Public Works of the District of Columbia.

Improving Seventh-street road	$2,500

Subpœna.

In the Supreme Court of the District of Columbia. March 2, 1874.

ABNER C. P. SHOEMAKER, COMPLAINANT,
vs.
THE DISTRICT OF COLUMBIA, AND ALEXANDER R. Shepherd, Henry A. Willard, Jas. A. Magruder, Adolf Cluss, John B. Blake, composing Board of Public Works, Defendants.
} No. 3,616. Eq. Doc.

The President of the United States to the District of Columbia,
Alexander R. Shepherd, Henry A. Willard, Jas. A. Magruder,
Adolf Cluss, John B. Blake, Bd. of Public Works, defendants.

39 You are hereby commanded to appear in this court at its first special term, occuring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness: D. K. CARTTER,
Chief Justice.

[SEAL.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Asst. Clerk.

Memorandum.—That the defendant is to enter its appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

Restraining Order. Filed ——, 1874.

An original bill, praying that deft. Board of Public Works be re-
strained from proceeding to sell complainant's property in
40 said bill mentioned at the instance of any holder of the cer-
tificate of indebtedness therein referred to, has been filed and
considered by the court. Whereupon, upon consideration thereof, it is by the court ordered, this 10th day of June, A. D. 1874, that until further order said defendant be and it is hereby restrained as prayed.

By order of the court. A. WYLIE, *Justice, &c.*

Marshal's Return.

Served all.

A. SHARP, *Marshal.*

March 2d, '74.

Service accepted for all.

WILLIAM A. COOK,
Atty. for Deft.

March 2, 1874.

41 *Order pro confesso.* Filed May 8, 1874.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA, AND ALEXander R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, John B. Blake, composing Board of Public Works.
No. 3,616. Eq. Doc. 13.

The defendants above named, after being duly served with subpœna and appearing, having failed nevertheless to answer unto the complainant's bill of complaint, on or before the next succeeding rule day, it is thereupon, upon motion of the said complainant, by T. A. Lambert, his solicitor, this eighth day of May, A. D. 1874, by the court ordered and decreed that the said bill of complaint be and the same is hereby taken as confessed by the said defendants. 42

And it is further ordered that it be referred to the auditor to ascertain and report to the court the sum or sums of money wherewith the complainant is legally chargeable for and on account of his proper proportion of the one-third cost of so much of the special improvements in the said bill mentioned and described, as were made in pursuance and within the limitation of the appropriation therein stated to have been made by the legislative assembly of the District of Columbia, in and by their act approved July 10th, A. D. 1871; and to that such testimony as may be material and proper to the cause, the court reserving all other matters for the final decree.

By the court. A. W.

43 *Stipulation to strike out pro confesso.* Filed May 29, 1874.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA ET AL.
No. 3,616. Eq. Doc. 13.

It is hereby stipulated and agreed, on the part of the several and respective defendants to the above-entitled cause, by their counsel hereunto subscribing, that any and all proceedings for the collection of the assessment tax on account of the special improvement of the Seventh-street road from Boundary street to the district line, in the said bill of complaint mentioned, against the property therein described of complainant, shall be stayed and suspended, pending proceedings in said cause in the Supreme Court of the District of Columbia; and it is also agreed, on the part of the complainant, that the decree *pro confesso* heretofore taken may be vacated, together with the accompanying order of reference to the auditor, provided defendants' answer be this day filed. 44

WM. A. COOK,
Counsel for Defendants.

T. A. LAMBERT,
Counsel for Complainant.

May 29, 1874.

Separate Ans. of the Board of Public Works. Filed May 29, 1874.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA, ALEXANDER R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, John B. Blake, composing the Board of Public Works of the District of Columbia.
No. 3,616. Eq. Doc. 13.

The separate answer of the Board of Public Works:

45 First. It is admitted that the defendants constitute the Board of Public Works of the District of Columbia.

Second. It is admitted that the complainant is the owner of the property described in the bill.

Third. It is admitted that the complainant was notified that the defendants had assessed against his property the sum of ——— dollars.

Fourth. Without admitting the particulars as stated in this paragraph of the bill, the defendants refer for a full and correct statement of the facts to their report mentioned in said paragraph.

Fifth. It is admitted that the power of the defendants to make assessments for improvements is derived from the 32d section of the organic act, together with the acts of the legislative assembly 46 in relation thereto. It is denied that the only appropriation for the improvement of Seventh-street road was an appropriation of twenty-five thousand dollars ($25,000). It is also denied that the improvement of Seventh street was restricted in the mode set forth in the bill, and that the defendants had no authority to make the improvements carried on by it, and to make the assessments made by it for said improvements.

Sixth. It is denied that the improvements to the extent that the cost was in excess of twenty-five thousand dollars ($25,000) was unauthorized by law, and that the property of the complainant is not liable for the assessments for work done beyond this sum.

Seventh. It is denied that any part of the assessments against the property of the complainant is improper or unjust in conse- 47 quence of the existence of church and school property. It is denied that the cost of improvements in connection with church and school property is chargeable to the general fund. It is denied that the complainant cannot ascertain the amount chargeable in connection with church and school property without a discovery from the defendant, and that there is any just ground contained in the bill for such discovery.

Eighth. It is denied that in derogation of any right of the complainant the defendant has caused to be prepared and issued a certificate of indebtedness against the property of the complainant to an amount alleged to be wrongfully charged against him, and that by any certificate of the kind any cloud is thrown on the title of the complainant's property.

48 Ninth. The allegations in this paragraph are denied in the form and manner in which they are stated.

Tenth. It is admitted that the certificates of assessments against the complainant's property have passed out of the hands of the defendants, and it is averred that the certificates which have been issued against the proper*ty* of the complainant are in all respects in accordance with the act of Congress and legislative assembly authorizing the same. It is admitted that if the certificates are not paid that a sale of the property may be had in accordance with the act of the legislative assembly in relation thereto. It is denied that either in law or equity the said certificates of indebtedness issued against the property of the complainant should be delivered up to him.

49 Eleventh. It is denied that the legislative assembly of the District of Columbia has failed to execute any discretionary power conferred upon it by the acts of Congress in relation to the assessment of the cost of improvement upon property-owners, and that on account of any such failure the complainant is not chargeable with any tax or assessments made against him; on the contrary, it is averred that the legislature has passed a proper act in relation to the assessment of improvements, which will be found in

Twelfth. Any and all allegations of the bill not heretofore denied or admitted are either untrue in fact or made up of incorrect statements of law and of erroneous legal propositions; and it is submitted that the bill of the complainant presents no question for the action of a court of equity, and only such as can be disposed of by a court of law.

50 Having fully answered the bill of the complainant, the defendant prays that it may be hence dismissed with costs, &c.

ALEX. R. SHEPHERD.
H. A. WILLARD.
JAMES A. MAGRUDER.
JNO. B. BLAKE.

COUNTY OF WASHINGTON, }
DISTRICT OF COLUMBIA. } *ss.*

We do solemnly swear that we have read the bill aforesaid by us subscribed and know the contents thereof; and that the facts therein stated upon our personal knowledge are true, and that the facts, on information and belief, we believe to be true.

JAMES A. MAGRUDER.

Sworn to and subscribed before me, this twenty-fifth day of May, 1874.

M. FRANK KELLEY, *J. P., D. C.* [SEAL.]

51 *Replication.* Filed May 29, 1874.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA, Alexander R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, John B. Blake, comprising the Board of Public Works. } No. 3,616. Eq. Doc 13.

The complainant joins issue with the defendant, "The Board of Public Works," and will hear the cause on bill, answer of said board, and exhibits.

T. A. LAMBERT,
Counsel for Complainant.

52 *Suggestion of facts for Revivor of cause.* Filed Aug. 19, 1874.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA, Alexander R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, John B. Blake, comprising the Board of Public Works for said District. } No. 3,616. Eq. Doc. 13.

Whereas the above-entitled cause hath become abated, by reason of the removal from office of the governor of the District of Columbia, one of the defendants therein named, and by reason of the abolition of the Board of Public Works, another of the defendants therein named.

And whereas the power and authority hitherto exercised by the said governor and Board of Public Works of said District
53 are now vested in William Dennison, Henry T. Blow, and J. H. Ketcham, who constitute and compose the commission, for that purpose appointed, under and by virtue of the act of Congress approved on the 20th day of June, A. D. 1874, entitled "An act for the government of the District of Columbia, and for other purposes."

The clerk is therefore requested to issue process of subpœna, requiring the said William Dennison, Henry T. Blow, and J. H. Ketcham, commissioners as aforesaid for the said District of Columbia, to appear and show cause, if any they have, why said cause should not be revived.

T. A. LAMBERT,
Sol'r and Counsel for Compl't.

To the clerk.

54 *Rule to show cause.*

In the Supreme Court of the District of Columbia.

A. C. P. SHOEMAKER *vs.* THE DISTRICT OF COLUMBIA ET AL.	No. 3,616. Equity Docket 13.

On Tuesday, the 6th day of October, 1874, a motion by complainant for leave to file bill of revivor will be heard; you are hereby notified to appear and show cause, if any you have, against the same.

Attest: R. J. MEIGS,
Clerk, &c.,
[SEAL.] By R. J. MEIGS, JR.,
Asst. Clerk, &c.

Marshal's Return.

Served copy of the within bill on Wm. Dennison, one of the commissioners of Dist. of Col.

A. SHARP, *Marshal.*

Augt. 20th, 1874.

DISTRICT ATTORNEY'S OFFICE,
Aug. 20, 1874.

Personal service on Wm. Dennison, one of the commissioners for the District of Columbia, acknowledged.

W. BIRNEY,
A. Attorney for the District of Columbia.

55 *Bill of Revivor.* Filed Sep. 18, 1874.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER *vs.* THE DISTRICT OF COLUMBIA, Alexander R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, John B. Blake, composing the Board of Public Works of said District.	No. 3,616. Eq. Doc. 13.

To the Supreme Court of the District of Columbia, sitting in equity.

Humbly complaining showeth unto your honorable court your orator, Abner C. P. Shoemaker, that on or about the second day of March, A. D. 1874, your orator exhibited his bill of complaint in this honorable court against the District of Columbia, and 56 Alexander R. Shepherd, Henry A. Willard, James A. Magruder, Adolf Cluss, and John B. Blake, composing the Board of Public Works of said District, as defendants thereto,

thereby stating such several matters and things as are therein for that purpose more particularly mentioned and set forth, and praying that the assessment therein referred to, against the property of your orator, fronting on Seventh-street road between Boundary street and the district line, and the certificate of indebtedness issued in pursuance thereof, may be decreed to be void, and that said certificate may be withdrawn and canceled; and that in the meantime said Board of Public Works might be restrained from proceeding to sell your orator's said property or any part thereof, at the instance of any holder of said certificate of indebtedness; and that if said property is, in the judgment of this honorable court,
57 chargeable with any part of the amount charged in said assessment, then that said portion might be ascertained in such manner as to the court should appear right, and that upon payment thereof the said property may be decreed to be discharged of and from any further claim on account of said assessment.

2. And your orator further showeth, that process duly issued against the said defendants, and that the said defendant, the Board of Public Works, appeared and put in its answer to the said bill, and that your orator thereafterwards, to wit, on the 10th day of June, A. D. 1874, obtained an injunction to restrain the said defendants, the Board of Public Works, from proceeding to sell your orator's said property at the instance of any holder of said
58 certificate of indebtedness, but that no further proceedings have been had in said cause, as in and by the records of your honorable court will appear, reference being thereunto had.

3. Your orator further showeth unto this honorable court, by way of supplement, that thereafterwards, to wit, on the 20th day of June, A. D. 1874, the Congress of the United States, by their act on that day approved, entitled "An act for the government of the District of Columbia, and for other purposes," repealed all provisions of law providing for an executive, for a secretary for the District, for a legislative assembly, for a board of public works, and for a delegate in Congress in the District of Columbia, and in and by the second section of said act provided that the President of the United States, by and with the advice of the Senate, should be authorized to appoint a commission consisting of three persons, who
59 shall, until otherwise provided by law, exercise all the power and authority at that time lawfully vested in the governor or Board of Public Works of said District, except as thereinafter limited.

4. Your orator further showeth, that thereupon a commission, as provided for in said second section of said act of Congress, was duly appointed, and that the same consists at the present time of William H. Dennison, Henry D. Blow, and J. H. Ketcham.

5. And your orator further showeth, that the said suit and proceedings have become abated by the aforesaid abrogation of the executive and the Board of Public Works of said District, and your

orator is, as he is advised, entitled to have the said suit and proceedings revived against William H. Dennison, Henry T. Blow, and J. H. Ketcham, the commissioners as aforesaid for said Dis-
60 trict, and to have the said cause put in the same state and
condition as the same was in previously to the passage of the act of Congress aforesaid.

To the end, therefore, that the said defendants may answer the premises, and that the said suit and proceedings, which so became abated as aforesaid, may stand revived and be in the same plight and condition as the same were in at the time of the passage of said act of Congress, or that the defendants may show good cause to the contrary, may it please your honorable court to grant unto your orator the most gracious writ of subpœna to revive, issuing out of and under the seal of the honorable court, to be directed to the said William H. Dennison, Henry T. Blow, and J. H. Ketcham, commissioners as aforesaid, thereby commanding them at a cer-
61 tain day, and under a certain pain to be therein limited, per-
sonally to appear before your honorable court and then and there to show cause, if they can, why the said suit and proceedings therein had should not stand and be revived against them and be in the same plight and condition as the same were at the time of the abatement thereof; and, further, to stand to and abide such order and decree in the premises as to this honorable court shall seem meet. And your orator shall ever pray, &c.

T. A. LAMBERT,
Solicitor for Complainant.

62 *Bill of Revivor and Supplement.* Filed Mar. 13, 1875.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER *vs.* THE DISTRICT OF COLUMBIA ET AL.	No. 3,616. Eq. Doc. 13.

To the Supreme Court of the District of Columbia.

Humbly complaining showeth unto your honorable court your orator, Abner C. P. Shoemaker, that on or about the 2d day of March, A. D. 1874, your orator exhibited his original bill of complaint in this honorable court against the District of Columbia, and Alexander R. Shepherd and others, composing the Board of Public Works of said District, as defendants thereto, thereby stating the several matters and things therein mentioned, and praying that the assessment therein referred to against the property of your
63 orator therein described may be decreed to be void, together
with the certificate of indebtedness issued in pursuance thereof; that said certificate may be withdrawn and canceled, and that in the meantime said Board of Public Works might be restrained from proceeding to sell your orator's said property, or any part

thereof, at the instance of any holder of said certificate of indebtedness, &c.

2. And your orator further showeth that the said defendants, being duly served with process, appeared to the said original bill, and that the said Board of Public Works put in its answer thereto; and the cause being at issue the same came on to be heard, when the court was pleased to order and decree that the said Board of Public Works be restrained as prayed.

64 3. And your orator further showeth that before any further proceedings were had in the said suit, and on or about the 20th day of June, A. D. 1874, all provisions of law providing for an executive, a secretary, legislative assembly, board of public works, and a delegate in Congress in said District of Columbia, having been repealed by virtue of an act of the Congress of the United States, entitled "An act for the government of the District of Columbia, and for other purposes," and a commission, consisting of three persons, to be appointed and exercise authority as therein prescribed and limited, having been substituted, the President of the United States, by and with the advice of the Senate, constituted and appointed William H. Dennison, Henry T. Blow, and J. H. Ketcham members of said commission.

65 4. And your orator further showeth that the said suit having become abated by the operation of the said act of Congress in abrogating the executive and Board of Public Works of the District of Columbia, your orator, on or about the 18th day of September, A. D. 1874, filed his bill of revivor in this honorable court against the said William H. Dennison, John T. Blow, and J. H. Ketcham, commissioners as aforesaid, thereby stating to the effect aforesaid, and praying that said suit might stand revived and be in the same plight and condition as the same were in at the time of the passage of said act of Congress, &c.

5. And your orator showeth that the said suit and proceedings were accordingly duly revived, as in and by the record of said proceedings will fully appear, reference being thereunto had.

66 6. And your orator further showeth that before any further proceedings were had in the said suit, and on or about the —— day of ———, 187–, the said Henry T. Blow, one of the commissioners aforesaid, having resigned his said office of commissioner, one Seth Ledyard Phelps was appointed to serve in his place and stead by the President of the United States, acting by and with the advice and consent of the Senate, as in said act of Congress is provided as aforesaid.

And your orator further showeth that the said suit and proceedings having become abated by the resignation of the said John T. Blow, commissioner as aforesaid, your orator is, as he is advised, entitled to have the said suit and proceedings revived against the said Seth Ledyard Phelps, and to have the said cause put in 67 the same state and condition as the same was in previously to the resignation as aforesaid of the said John T. Blow.

And your orator, on information and belief, and by way of supplement, further showeth that the certificate of indebtedness so as aforesaid issued against the property of your orator, as set forth in his original bill of complaint, was transferred by the said Board of Public Works of the District of Columbia to the First National Bank of New York, and that the said First National Bank of the State of New York is now the holder of said certificate, and ought to be made a party defendant to these proceedings.

And your orator is informed and believes, and so charges, that the said certificate so wrongfully issued against his property aforesaid was not transferred by the said Board of Public Works 68 to the said First National Bank of New York in good faith and for value, but that the same was transferred to the said First National Bank of New York as a collateral security; and your orator calls upon the defendants, the Commissioners for the District of Columbia, as well as upon said First National Bank of New York, for a full, particular, and complete discovery of all facts relating to the time, place, and manner of making of said transfer, as well as a specific statement of the consideration, if any, on which said transfer was made.

To the end therefore that the said suit and proceedings which became abated as aforesaid may stand revived and be in the same plight and condition as the same were in at the time of the 69 abatement thereof, or that the defendant, Seth Ledyard Phelps, may show good cause to the contrary; and that the First National Bank of New York may be made a party defendant to this cause, and for that purpose be served with process of subpœna; may it please this honorable court the premises considered, to grant unto your orator the most gracious writ of subpœna issuing out of this honorable court, directed to the defendants and commanding them, &c.

T. A. LAMBERT,
Sol'r and Counsel for Complt.

Subpœna.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER, COMPLAINANT,
against
THE DISTRICT OF COLUMBIA ET AL., DEFENDANT.
No. 3,616.
Eq. Doc. 13.

70 The President of the United States to Seth Ledyard Phelps, Comr. D. C., the First National Bank of New York, defendant.

You are hereby commanded to appear in this court at the first special term occurring 14 days after service of this subpœna, and answer the exigency of the bill of revivor and show cause why the said suit shall not be revived against you, under pain of attachment and such other process of contempt as the court shall award.

Witness: D. K. CARTTER, *Chief Justice.*
R. J. MEIGS, *Clerk, &c.,*
[SEAL.] By L. P. WILLIAMS, *Asst. Clerk.*

Marshal's Return.

Sum'nd Seth L. Phelps, Comr. of D. C., and Wm. A. Cook for First Nat. Bank of N. Y.

March 15, '75. ALEX. SHARP, *Marshal.*

71 *Order referring cause to General Term.* Filed March 23, 1875.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA ET AL.
} No. 3,616. Eq. Doc. 13.

It is hereby, this 23d day of March, A. D. 1875, by the court ordered that the above-entitled cause be heard in the general term of the court in the first instance.

By the court. A. W.

72 *Separate Ans. of First Natl. Bank of N. Y.* Filed Apr. 26, 1875.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA ET AL.
} No. 3,616. Eq. Doc. 13.

The answer of the 1st National Bank of New York, one of the defendants to the bill of complaint of Abner C. P. Shoemaker, plaintiff.

This defendant now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception, or otherwise than can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering saith:

1st. It is admitted that the said certificate of indebtedness
73 issued against the property of the said complainant was transferred by the Board of Public Works of the District of Columbia to this defendant, the First National Bank of New York, and that the said certificate as aforesaid is now in the possession of this defendant.

2. It is denied by the defendant that the said certificate was wrongfully issued against the property of the complainant, and this defendant saith that it is not true that the said certificate was not

transferred to this defendant, the First National Bank of New York, in good faith and for valuable consideration, but, on the contrary, this defendant saith that the said transfer was made in perfect good faith and for valuable consideration.

3rd. It is not true that the said certificate was deposited
74 with this defendant as a collateral security, but, on the contrary, this defendant saith that the said certificate was sold to this defendant for a good and valuable consideration, viz: the par value of the certificate with interest, less two and one-half per cent.; that it was in consideration of that sum so paid, and for none other, that the said transfer was made, and that they became the purchasers of said certificate for the valuable consideration aforesaid in the ordinary course of business and without any notice direct or indirect that there was any pretence by the plaintiff of any irregularity or illegality in the assessment on which it was based or in the certificate itself.

As regards the other matters and things in the bill of said complainant, this defendant on information and belief adopts the answer of the authorities of the District of Columbia heretofore filed.
75 And this defendant denies all and all manner of unlawful combination and confederacy, wherewith it is by the said bill charged, and submits that the bill presents no case for the equitable interference of the court, and that all the matters in said bill contained are properly cognizance at law, and humbly prays to be hence dismissed, with reasonable costs and charges in this behalf most wrongfully sustained. GEO. F. BAKER, *Cash.*

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

I, George F. Baker, do solemnly swear that I have read the answer by me subscribed, and know the contents therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

GEO. F. BAKER, *Cash.*

Sworn and subscribed to, this fifth day of April, A. D. 1875.

JAS. F. BROWN, [SEAL.]
Notary Public N. Y. County.

76 *Replication to Ans. of* 1st *Natl. Bank.* Filed April 26, 1875.

In the Supreme Court of the District of Columbia, April 8th, 1875.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 3,616. Eq. Doc. 13.

The complainant joins issue with the defendant, The First National Bank of New York, and will hear the cause on bill, answers, and exhibits.

T. A. LAMBERT,
Counsel for Complt.

Stipulation. Filed June 2, 1875.

In the Supreme Court of the District of Columbia.

A. C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 3,616. Eq. Doc. 13.

77 It is hereby stipulated and agreed by and between the parties to the above-entitled cause, acting through their respective counsel hereunto subscribing, that in view of the continuance of said cause to the next succeeding or September term of the court in general term, and in the event of its appeal at that time to the Supreme Court of the United States, each party shall afford to the other every facility possible, by way of stipulation or otherwise, for the advancement and speedy hearing of said cause in said supreme court; and further that all attempt at collecting the special assessment tax upon the Seventh-street road shall be stayed pending the final decision of said cause in general term.

T. A. LAMBERT, *for Plff.*
E. L. STANTON, *for Dist. Col.*
WILLIAM A. COOK,
For 1st Natl. Bank.

78 *Bill of Revivor & Amended Suppl. Bill.* Filed Dec. 10, 1875.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 3,616. Eq. Doc. 13.

To the Supreme Court of the District of Columbia.

Humbly complaining showeth to your honorable court your orator, Abner C. P. Shoemaker, that on or about the 2d day of March, A. D. 1874, your orator exhibited his original bill of complaint in this honorable court against the District of Columbia and against Alexander R. Shepherd and others, composing the Board of Public Works of said District, as defendants thereto, thereby stating the several matters and things therein mentioned, and praying that the assessment therein referred to against the property of your 79 orator therein described may be decreed to be void, together with the certificate of indebtedness issued in pursuance thereof; that said certificate may be withdrawn and canceled, and that in the meantime said Board of Public Works might be restrained from proceeding to sell your orator's said property, or any part thereof, at the instance of any holder of said certificate of indebtedness, &c.

2. And your orator further showeth, that the said defendants, being duly served with process, appeared to the said original bill, and that the said Board of Public Works put in its answer thereto;

and the cause being at issue the same came on to be heard, when the court was pleased to order and decree that the said Board of Public Works be restrained as prayed.

3. And your orator further showeth that before any further
80 proceedings were had in the said suit, and on or about the 20th
day of June, A. D. 1874, all provisions of law providing for an executive, a secretary, legislative assembly, Board of Public Works, and a delegate in Congress in said District of Columbia, having been repealed by virtue of an act of the Congress of the United States, entitled "An act for the government of the District of Columbia, and for other purposes," and a commission consisting of three persons, to be appointed and exercise authority as therein prescribed and limited having been substituted, the President of the United States, by and with the advice of the Senate, constituted and appointed William H. Dennison, Henry T. Blow, and J. H. Ketcham members of said commission.

4. And your orators further showeth that the said suit having
become abated by the operation of the said act of Congress
81 in abrogating the executive and Board of Public Works of
the District of Columbia, your orator on or about the 18th day of September, A. D. 1874, filed his bill of revivor in this honorable court against the said William H. Dennison, Henry T. Blow, and J. H. Ketcham, commissioners as aforesaid, thereby stating to the effect aforesaid and praying that said suit might stand revived and be in the same plight and condition as the same was in at the time of the passage of said act of Congress, &c.

5. And your orator showeth that the said suit and proceedings were accordingly duly revived as in and by the record of said proceedings will fully appear, reference being thereunto had.

6. And your orator further showeth that before any further pro-
ceedings were had in the said suit, and on or about the ——
82 day of————, 187–, the said Henry T. Blow, one of the
commissioners aforesaid, having resigned his said office of commissioner, and Seth Ledyard Phelps was appointed to serve in his place and stead by the President of the United States, acting by and with the advice and consent of the Senate as in said act of Congress is provided as aforesaid.

7. And your orator further showeth that the said suit and proceedings having become abated by the resignation of the said Henry T. Blow, commissioner as aforesaid, your orator is, as he is advised, entitled to have the said suit and proceedings revived against the said Seth Ledyard Phelps, and to have the said cause put in the same state and condition as the same was in previously to the resignation
as aforesaid of the said Henry T. Blow.

83 8. And your orator, by way of supplement and amendment,
leave of the court being first for that purpose had and obtained, further showeth that the certificate of indebtedness, so as set forth in his original bill, issued against the property of your or-

ator, was transferred by the said Board of Public Works of the
District of Columbia to the First National Bank of New York,
and that the said First National Bank of New York is now the
holder of said certificate of indebtedness and ought to be made a
party defendant to this suit. And your orator is informed and be-
lieves, and so charges, that the said certificate so wrongfully issued
against his property as aforesaid, was not transferred by the Board
of Public Works to the said First National Bank of New York in
good faith and for value, but that the same was transferred
84 to the said First National Bank of New York as a collateral
security; and your orator calls upon the defendants, the Com-
missioners for the District of Columbia, as well as upon the First
National Bank of New York, for a full, particular, and complete dis-
covery of all facts relating to the time, place, and manner of mak-
ing said transfer, as well as a specific statement of the consideration,
if any, upon which said transfer was made.

9. And your orator further showeth, still by way of supplement
and amendment, that the said certificate of indebtedness, so issued
as aforesaid by the Board of Public Works of the District of Col-
umbia against the aforesaid property of your orator, being void by
reason that the same was issued in pursuance of an illegal assess-
ment under the circumstances set forth in the original bill of
85 complaint, your orator well hoped that the said First Na-
tional Bank of New York would, at the reasonable request of
your orator, have delivered up the same to be canceled, as in jus-
tice and equity it ought to have done. But now so it is, may it
please this honorable court, the said First Natianal Bank of New
York, combining and confederating with the said Commissioners of
the District of Columbia and divers other persons to your orator
unknown, etc., refuses so to do; and that the period of one year
having elapsed since the issuing of said certificate of indebtedness,
the said First National Bank of New York threatens and intends to
enforce the collection of said certificate of indebtedness, and for that
purpose to apply to the said Commissioners of the District of Col-
umbia to sell the property aforesaid of your orators against which
the said assessment and certificate exist.

86 10. And your orator humbly insists that he is well entitled
to have the aforesaid certificate of indebtedness delivered up
by the First National Bank of New York and canceled, he being ready
and willing and hereby offering to pay what, if anything, may on a
just accounting be adjudged to be due and payable by him as his
proper proportion of the one-third cost of the special improvement
of the Seventh-street road, on the basis of the sum of money actu-
ally and legally appropriated therefor, as in and by his original bill
is particularly set forth, and that the said First National Bank of
New York ought not to be permitted to proceed to enforce the col-
lection of said certificate of indebtedness as aforesaid.

To the end, therefore, that the said suit and proceedings which

87 became abated as aforesaid may stand revived and be in the same plight and condition as the same were in at the time of the abatement thereof, or that the defendant, Seth Ledyard Phelps, may show good cause to the contrary.

And that the First National Bank of New York may be made a party defendant to this cause, and for that purpose be served with process of subpœna.

And that said First National Bank of New York may be decreed to deliver up, and the said commissioners of the District of Columbia be decreed to procure the said certificate of indebtedness to be delivered up to your orator to be canceled as having been issued by the said Board of Public Works without authority of law and transferred to the First National Bank of New York.

88 And that, if in the judgment of this honorable court, your orator or your orator's property is chargeable with any part of the amount charged in said assessment or in the aforesaid certificate of indebtedness issued in pursuance thereof, then that such portion may be ascertained in such manner and upon such accounting as to the court shall seem proper, and that upon payment thereof your orator's said property may be decreed to be forever discharged of and from any further claim or lien on account of said assessment and certificate of indebtedness.

And that the said defendants respectively may be restrained by the injunction of this honorable court from proceeding to enforce the collection of said certificate of indebtedness by sale of your orator's said property, or otherwise howsoever, and that they may also be restrained from negotiating, endorsing, or delivering over
89 the said certificate of indebtedness to any person or persons.

And that your orator may have such other and further relief in the premises as to this honorable court shall seem meet, and the nature of his case shall require.

May it please the court, the premises considered, to grant unto your orator the most gracious writ of subpœna to revive issuing out of this honorable court, to be directed to the said Seth Ledyard Phelps, and the most gracious writ of subpœna to appear and answer, to be directed to the First National Bank of New York, thereby commanding him and it respectively, at a certain day, and under a certain pain, to be therein limited, etc.

And your orator will ever pray, etc.

A. C. P. SHOEMAKER.

T. A. Lambert,
Sol'r and of Counsel.

90 I do solemnly swear that I have heard read the bill by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

A. C. P. SHOEMAKER.

Subscribed and sworn to before me, this 10th day of December, 1875.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Asst. Clerk*.

Stipulation for continuation of cause. Filed Feb. 5, 1876.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 3,616. Eq. Doc. 13.

91 It is hereby agreed, on behalf of the complainant, that the above-entitled cause may be continued to the April (1876) general term of the court, at the instance of *of* the defendant, the First National Bank of New York, on condition that the answer of said defendant to the complainant's supplemental bill shall be filed in thirty (30) days from the date hereof, and that the briefs of counsel for the defendant shall be submitted to the counsel for complainant at least 30 days before the commencement of the said April term of the court.

T. A. LAMBERT,
Counsel for Compt.
WILLIAM A. COOK,
For 1st Nat. Bank N. Y.
E. L. STANTON,
For Dist. Col.

Feb. 5th, 1876.

92 *Decree.* Filed June 12, 1876.

In the Supreme Court of the District of Columbia.

ABNER C. P. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 3,616. Eq. Doc. 13.

This cause coming on to be heard in the general term of the court in the first instance upon the original bill, answers of the defendants, and other proceedings therein had, and being argued by counsel and duly considered by the court, it is thereupon, this 12th day of June, A. D. 1876, by the court ordered, adjudged, and decreed that the special assessment tax heretofore levied upon the property of the complainant by the defendant, the Board of Public Works of the District of Columbia, and in said original bill of complaint mentioned, together with the certificate of assessment issued in pursuance of said assessment tax, and now in the possession of the defendant, the First National Bank of the State of New York, be, and 93 the same are hereby, decreed to have been made and issued without authority of law, and to be therefore void and of none effect to charge the said complainant, or his said property, with any indebtedness whatsoever; that the said defendant, the First National Bank of the State of New York, as the holder of the certificate of indebtedness aforesaid, be, and it is hereby, perpetually enjoined from attempting the collection of the said certificate; that the defendants, the Commissioners of the District of Columbia, as the successors of the defendant, the Board of Public Works aforesaid, be, and they are hereby, perpetually enjoined from exposing to sale, at the instance of the aforesaid holder of the said certificate of indebtedness, the aforesaid property of the complainant, in satisfaction of said certificate; and that the said defendant, the First National Bank of the State of New York, be required to deliver up said certificate of indebtedness unto the complainant 94 for cancellation as is prayed in and by the said original and supplemental bill in said cause.

And thereupon the defendants, in open court, pray an appeal to the Supreme Court of the United States, which is allowed.

By the court. A. W.

Appeal Bond to the S. C. U. S.

In the Supreme Court of the District of Columbia, the 11th day of July, 1876.

ABNER C. SHOEMAKER
vs.
THE DISTRICT OF COLUMBIA AND THE First National Bank of New Yark. } 3,616. Equity Docket 13.

Know all men by these presents, that we, the First National Bank of New York, by George F. Baker, cashier, Samuel C. 95 Thompson, and Ebenezer Scofield, are bound unto above-named Abner C. Shoemaker, in the sum of four thousand dollars, to be paid to the said Abner C. Shoemaker, his executors, or administrators.

To which payment well and truly to be made, we bind said bank, ourselves, and each of us, and our successors, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this eighth day of July, 1876. Whereas, the above-named First National Bank of New York hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said Supreme Court of the District of Columbia.

Now, therefore, the condition of this obligation is that if the above-named First National Bank of New York shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

FIRST NATIONAL BANK OF
THE CITY OF NEW YORK,
By GEO. F. BAKER, *Cash'r.*
SAMUEL C. THOMPSON.
EBENEZER SCOFIELD.

Sealed and delivered in presence of—
THOMAS P. SCOFIELD, [SEAL.]
Notary Public.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 13th day of October, 1876.

[SEAL.] R. J. MEIGS, *Clerk.*

(Endorsed:) Dist. Col. Sup. Court. No. 531. The First National Bank of the city of New York et al., appellants, vs. Abner C. Shoemaker. Filed 14th October, 1876.

Supreme Court of the United States.

No. 531.

FIRST NATIONAL BANK

OF NEW YORK, *et. al.*,

Appellants,

VS.

ABNER C. SHOEMAKER,

Appellee.

Appeal from the Supreme Court of the District of Columbia.

BRIEF OF THE FIRST NATIONAL BANK OF NEW YORK.

WILLIAM A. COOK,
WALTER S. COX,
Solicitors for First National Bank of New York.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS.
1878.

Supreme Court of the United States.

FIRST NATIONAL BANK, ET AL., APPELLANTS
v.
ABNER C. SHOEMAKER, APPELLEE.
No. 531.

Appeal from the Supreme Court of the District of Columbia.

WILLIAM A. COOK,
WALTER S. COX,
Solicitors for First National Bank of New York.

HISTORY OF THE CASE.

The Congress of the United States passed an act, entitled "An act to provide a government for the District of Columbia," which was approved February 21, 1871.

16 St. at L., p. 419.

The 1st section of this act created a government "*out of all that part of the territory of the United States included within the limits of the District of Columbia * * by the name of the District of Columbia,*" * * and by that name constituted it "a body corporate for municipal purposes," with power "to contract and be con-

" tracted with, sue and be sued, plead and be empleaded, " have a seal, and exercise all other powers of a municipal " corporation not inconsistent with the Constitution and " laws of the United States," and the other provisions of the act.

The 5th section established a Legislative Assembly, and the 18th section limited the power of the Assembly " to all rightful subjects of legislation within the District,"

* * * * * * * * * *

but expressly rendered its legislation " subject to repeal or modification by the Congress of the United States," and reserved to Congress the power of concurrent and final legislation.

The 2d section provided for the appointment of a Governor by the President of the United States and confirmation by the Senate.

By the 37th section a Board of Public Works was established, to be composed of the Governor of the District and four other persons, to be appointed by the President, to hold office for four years.

This Board was given entire control of the streets, avenues, alleys, and sewers of the city, and of all other work which might be entrusted to it by the Legislative Assembly, and authorized to make all regulations which it deemed necessary to keep them in repair.

It was also authorized to disburse, on its warrants, all money appropriated by the United States or the District of Columbia for the improvements of streets, avenues, alleys, sewers, *roads*, and bridges.

And it was authorized to assess, in such MANNER as might be prescribed by law, upon the property adjoining, and especially benefited by the improvements authorized by law, and made by it, a reasonable proportion of the cost, not exceeding one-third; and that the amount so assessed should be collected AS other taxes.

It was provided that all contracts made by the Board should be in writing, and signed, and a copy be filed in the office of the Secretary of the District.

And it was then required that in order to bind *the District* to the payment of money for improvements which should be made by the Board, there must be antecedent appropriations.

All the powers of the Board were derived directly from the United States.

The Governor of the District was appointed in the early part of 1871.

The other members of the Board of Public Works were regularly appointed, and qualified on the 16th of March, 1871.

The Legislative Assembly, having been elected in April, 1871, met on the 15th of May, 1871, and immediately proceeded to legislation.

On the 10th of July, 1871, an act was approved entitled "An act making appropriations for improvements and re-

" pairs in the District of Columbia, and providing for the " payment thereof." The 1st section (1) appropriated the sum of four millions of dollars " for the improvement and " repair of the streets, avenues, alleys and *roads*, and " for the construction of sewers, bridges, and other public " works." And (2) directed that it should be used and expended according to the act of Congress of February 21, 1871,* and AS FULLY AS MAY BE PRACTICABLE AND CONSISTENT WITH THE PUBLIC INTEREST, in conformity with the plan of improvement submitted to the Legislature by the Board of Public Works in a communication bearing date 20th June, 1871.

This plan contained a statement of suggested " improvements and repairs," and an estimate of possible cost.

The *second* section provides that in no case should the Board enter into any contract for work in excess of the estimate *therefor* as contained in the submitted plan, less twenty per centum of the estimate.

On the 11th of August, 1871, a second act was passed. It authorized the Governor to anticipate the revenue which might arise from assessments and collection of taxes to the amount of *five* hundred thousand dollars, to be expended and disbursed for the improvement and repairs of streets, avenues, alleys, and roads in the District, and for the construction and repair of sewers, bridges, and other public works, agreeably to the 37th section of the " organic act."

And because of the necessity for improvements it was declared this act should " take effect immediately."

This act contained no special conditions or restrictions as to the expenditure of the money appropriated, and it was used *generally*.

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* This act, for convenience, has generally been referred to in the Court below and briefs as " *the organic act.*."

And by an act approved January 19, 1872, this sum was returned to the District; and the act sets out that the *five hundred thousand dollars* of the act of August 11, 1871, had been used as appropriated by the Board.

The Board of Public Works having been authorized by the act of Congress of February 21, 1871, to take control of the streets, *roads*, &c., and to improve them, and the District Government having also sanctioned improvements and made appropriations for them, at the first session of the Legislative Assembly an act was passed entitled "An "act prescribing the mode of assessment for special im-"provements and providing for the collection thereof." It was approved August 10, 1871.

The first section provided that "whenever any of the "improvements mentioned or referred to in section thirty-"seven of the act entitled 'An act to provide a government "'for the District of Columbia,' approved the twenty-first "day of February, one thousand eight hundred and sev-"enty-one, *shall be completed*, a *statement* of the cost "thereof shall be prepared by the Board of Public Works, "and be filed in the office thereof; and immediately there-"after an assessment based upon said statement shall be "made, as provided for in said section of said act, which "assessment shall be collected by the said Board in the "same manner as other taxes of the District of Columbia "are now or may hereafter be authorized to be collected."

The second section provided that within ten days after making an assessment the Board of Public Works should give written or printed notices to the proprietors of property adjoining and specially benefited by an improvement of the amount assessed against it, requiring it to be paid in thirty days, the return of service and mode to be made to the Board.

The notice was required to be personal on the proprietor or agent or tenant, or by pasting or placing a copy on the assessed property.

The third section provided that if any one notified as required should neglect or refuse to pay the amount assessed, that after thirty days from the service of the notice a certificate of indebtedness against the property should be issued, bearing interest, until paid, at the rate of ten per centum. And that until paid the certificate should remain and be a lien on the property; and if not paid within a year that the Board, ON APPLICATION OF THE HOLDER of the certificate, should proceed to sell the property against which it was issued, or so much of it as might be necessary to pay the assessment.

It was required that there should be an advertisement for three successive weeks in a newspaper of the District. And it was then declared that a deed should be given by the Governor, countersigned by the Secretary of the District, which should be deemed a good and perfect title to any property sold.

A right of redemption was then given within two years, by paying the purchase money and twenty per cent. thereon.

The property of the complainant was located outside of the city of Washington, on what was called the Seventh-street road.

The improvement was commenced in the fall of 1871, and completed in the latter part of 1872. There was delay in the assessment, but it was made after the completion of the work, and written notice given the complainant April 3, 1873.

The assessment not having been paid within thirty days from the notice, a certificate of indebtedness was issued by the Board of Public Works, and after the lapse of some time transferred to the First National Bank of New York, which became the holder for a valuable consideration—the par value of the certificate less two and one-half per cent.

This transfer was made before any adverse proceedings were instituted by the complainant, and so far as appears from the record—and in fact, without any notice, direct or indirect, oral or written—of any assumed equity or objection to the assessment on the part of the complainant.

And neither at the inception of the improvement, or during its progress, or upon its completion, did he in any form object to it.

His first manifested opposition was by the filing of his original bill, and the primary purpose was to prevent the sale of his property under the certificate issued against it agreeably to the act of the Legislative Assembly of Aug. 10, 1871.

The District paid its part of the cost of the improvement, viz., $93,836.84, and the United States a part, viz., $33,515.15.

The complainant, with others, has all along enjoyed the benefits of the improvement.

The complainant filed his original bill March 2, 1874.
Record, pp. 1 to 11.

This was answered by the Board of Public Works, May 29, 1874.

Record, pp. 14–15.

On the same day a replication was filed on the part of the complainant.

Record, p. 16.

The 43d Congress, sess. 1, passed an act, entitled "An "act for the government of the District of Columbia, and "for other purposes," which was approved June 20, 1874.

18 St. at Large, part 3, p. 116.

By this act the office of Governor was abolished and also the Board of Public Works, and a Commission authorized to be appointed in their place. The Commissioners were appointed shortly after the 20th of June, 1874.

Accordingly, on the 18th of September, the complainant filed a bill of revivor, making the Commissioners parties instead of the Board of Public Works.

Record, pp. 17–19.

On the 13th of March, 1874, in consequence of the resignation of one of the Commissioners, Hon. Henry D. Blow, a "bill of revivor and supplement" was filed.

Record, pp. 19–21.

By this bill the FIRST NATIONAL BANK OF NEW YORK was made a party.

Record, pp. 19, 22.

On the 26th of April the answer of the Bank was filed, and a replication on that day.

Record, pp. 22, 23.

On the 10th of December, 1875, a third "bill of review" and an amended "supplemental bill" was filed, but it does not appear to have been served, nor any further action had in relation to it.

Record, pp. 24–29.

This, however, is unimportant, as it contains no new or additional facts or averments.

Finally, the case was argued in the general term of the Supreme Court of the District of Columbia, and on the 12th of June, 1876, a decision rendered in favor of the complainant, appellee, and a decree made the same day.

Record, pp. 28, 29.

The decree first declares the assessment against the property of the complainant, and the certificate issued in pursuance of it, *entirely void, because made and issued without authority of law and insufficient to create " any indebtedness whatsoever ;"* and, *second*, that the First National Bank of New York be "perpetually enjoined from " collecting the certificate, and the Commissioners of the " District of Columbia from" exposing the property of the complainant to sale; and, *third*, that the Bank be required to deliver up the certificate to the complainant, for cancellation.

Record, pp. 28, 29.

An appeal was immediately taken both by the Commissioners of the District and the First National Bank of New York, and this decree is assigned as error, in all three of its parts.

POSITION OF THE PARTIES.

First of complainant below—appellee above.

The original bill is of chief importance—the others are mainly formal, and as respects parties.

An unnumbered paragraph in the commencement of the bill relates to the complainant, as a citizen of the District.

1. The first-numbered paragraph relates to the defendants, the Commissioners of the District.

2. The second paragraph sets out the undisputed ownership by the complainant of a piece of land near or along the Seventh-street road, in the District of Columbia.

3. The third alleges that on the 8th of April, 1873, the complainant received notice in writing, from the Board of Public Works, of an assessment for special improvements against his property, having a front of 2,819.70 feet, at 97.246-1000 cents per foot, and the notice is referred to as exhibit "A," showing the entire assessment of $2,742.04. It is also here alleged that the notice stated that unless the assessment was paid within thirty days a certificate of indebtedness would be immediately issued against the property, bearing interest until paid at the rate of ten per cent. per annum, and be a lien on the property, and, if not paid within a year that the property would be sold.

4. The fourth alleges that in November, 1873, the Board of Public Works submitted to Congress, as required, an annual report, in which the entire cost of the work was stated to be $174,268.44—of which $33,515.15 was chargeable to the United States, leaving the balance, $140,748.26—one-third of which was made chargeable to private property—viz., $46,918.42, and of this amount $2,819.70 against the complainant's property.

5. The fifth paragraph asserts that under the act of February 21, 1871, the Board of Public Works had no power to make contracts *to bind the District*, except in pursuance

of appropriations and within their limits, and that the power to make individual assessments or against individual property is limited to a reasonable part of the cost, not exceeding one-third, which shall be collected as other taxes.

And that the only appropriation for the Seventh-street road was $25,000, by the act of the Legislative Assembly of June 20, 1871, referred to in a plan and estimate submitted to the Legislature by the Board, and made part of the act; and that this sum was required to be expended as fully as practicable and consistent with the public interests, in accordance with the submitted plan, but that the Board could not *enter into any contract* less twenty per centum of the estimate, thus reducing the appropriation to $20,000. And that the cost of the improvement exceeded *this* estimate "seven times," and therefore *was not authorized by law*, and that the Board had no power to assess *any part* of the cost against the complainant's property.

6. The *sixth* paragraph avers that the complainant is advised and believes that *if* the improvement is not *wholly void and entirely illegal* it is *partly* so, to the extent of the alleged excess of the cost over the special appropriation, and that the property is only chargeable with its due proportion of the cost within the appropriation.

7. The seventh declares that along the line of the Seventh-street road was church and school property, and that the cost of the improvement in connection with it should have been paid by the District of Columbia, and no part of this added to the cost chargeable against the complainant's property But it is alleged that the complainant does not know, without a discovery, what this cost of improvement of such property was, and calls for a discovery.

8. The eighth paragraph asserts that *after the notice of assessment* the Board of Public Works, in derogation of complainant's rights, issued a certificate of indebtedness against his property, which, because of the general powers of the Board to make assessments, is *apparently valid*, and, issued under color of law, operates to throw a cloud on the title to the property.

9. The ninth, while admitting the general power of the Board to make assessments, based on a statement of the cost, and that it proceeded, apparently, within its powers, and that the issued certificate is a lien, declares that, *notwithstanding the apparent validity*, the proceedings were WHOLLY VOID, *by matter not on the face of the assessment and certificates or records, and which can only be shown by extrinsic evidence.*

10. The tenth states that the certificate of indebtedness is, in its nature, transferable, and that it was assigned by the Board, and, until paid, will be a lien, and that, if not paid within a year from the notice of assessment, on the application of the holder, the Board would sell the property, or so much thereof as may be necessary to satisfy the certificate, and that a deed would then be made which would be deemed a good and perfect title. And then submits that the Board should procure the certificate issued *under color, but really without authority of law*, to be delivered up and cancelled.

11. The eleventh avers that the Legislative Assembly was invested with a discretionary power by the act of Congress to determine what should be a reasonable proportion, not exceeding one-third, of the cost of improvements made by the Board, and that the Legislature failed to ex-

ercise this assented power, and that therefore no charge or assessment could be legally made against the complainant's property.

And that, moreover, the Legislature has failed to prescribe any rule or principle of assessment, and that the assessment was made arbitrarily and according to the number of front feet, without regard to any other consideration; and that no notice was given until after the assessment was made.

12. An *offer* is then made to pay the complainants part of the sum appropriated, and for which contracts were authorized, *if* the same be payable, and as soon as the appropriations shall be *legally* ascertained.

13. The prayer follows, (1) that the assessment and certificate be declared *without authority of law—of no validity—to create any lien;* (2) that the certificate be withdrawn and cancelled; (3) that the Board be enjoined from selling the complainant's property at the request of the holder of the certificate; (4) that if the property is chargeable with any part of the cost, it be ascertained by the Court in *such manner as to the Court shall seem proper*, and that, upon the payment thereof, the property may be discharged from any further claim, and (5) for further and other relief.

By a bill of "revivor and supplement" of March 13, 1875, fifth paragraph, it is alleged that the certificate was transferred to the First National Bank of New York—that it was the holder, and "on information and belief" it is charged that the transfer was not in good faith, but "as a collateral security," and a discovery of particulars is called for, as well as of the exact consideration given by the bank for the certificate.

And it is then prayed that the bank be made a party, etc.

THE BOARD OF PUBLIC WORKS AND ITS SUCCESSORS THE COMMISSIONERS OF THE DISTRICT.

The "separate answer" of the District or its representatives was filed May 29, 1874.

1. It is admitted that the defendants constituted the Board of Public Works.

2. It is admitted that the complainant is the owner of the property claimed by him.

3. It is admitted that he was notified, as alleged, of the assessment.

4. Instead of admitting the exact corrections of its alleged report referred to in the fourth paragraph, the report itself is referred to.

5. It is admitted that the power to make assessments is derived from the 37th section of the act of February 21, 1871, and the act of the Legislative Assembly of August 10, 1871.

And (2) it is expressly DENIED that the only appropriation for the Seventh-street road was $25,000.00; and, also, that the Board of Public Works, in making the improvement, was restricted to this sum less twenty per cent.; and (3) that the Board was without authority to make the improvement and assessments for it.

6. It is denied that to the extent the cost of the improvement exceeded the special appropriation of $25,000.00 it was unauthorized by law, and that for this reason the complainant's property is not subject to assessment.

7. It is denied that any part of the assessment is unjust because of school or church property, and that the cost of improvements in connection with such property should be charged to "the general fund," and that no discovery in this respect is required, or any proper ground stated for it.

8. It is denied that in derogation of any right of the complainant a certificate of indebtedness against his property by which a cloud is thrown on his title.

9. It is denied that in making assessments the Board proceeded only apparently according to law, and that while the assessment and certificate were valid on their face, extrinsic evidence, not on record, rendered them invalid.

10. It is admitted that the certificate passed out of the

hands of the Board, and it is averred that the certificate was issued in accordance with the act of Congress and laws of the Legislative Assembly.

And it is admitted that if the certificate should not be paid, that the property would be sold, as provided for by law.

And it is denied that, in law or equity, the certificate should be delivered up.

11. It is denied that the Legislative Assembly failed to execute any discretionary power, and that because of any such alleged failure the complainant is not chargeable with any tax or assessment for the improvement; and it is alleged that the Legislature passed a proper act in relation to assessment for improvement.

12. All allegations of the bill not before admitted or denied are stated to "*be untrue in fact, or made up of incorrect statements of law and of erroneous legal propositions.*"

And it is then submitted "*that the bill of the complainant presents no question for the action of a court of equity, and only such as can be disposed of by a court of law.*"

THE FIRST NATIONAL BANK OF NEW YORK

made a party on the 13th of March, 1875, its answer was filed April 26, 1875.

1. It is admitted that the certificate was transferred to it.

2. It is denied that the certificate was wrongfully issued

against the complainant's property, and that it was not transferred in good faith and for valuable consideration; and averred that it was made in perfect good faith and for valuable consideration.

3. It is (1) denied that the certificate was deposited with the bank as "collateral security," and it is (2) declared that *it was "sold for a good and valuable consideration, viz: "the par value of the certificate, with interest, less two "and one-half per cent.,"* and that it was in consideration of this sum the transfer was made.

And (3) it is averred that this purchase was not only *bona fide*, but that at the time it was made the bank had NO NOTICE, direct or indirect, of any pretence or claim on the part of the complainant that the assessment was irregular or illegal.

4. As respects all other matters, the answer of the Board of Public Works is adopted, and all combination is denied. And, finally, it is submitted that the bill presents no case for equitable interference, and that all matters contained in it are properly cognizable at law.

Such in brief are the positions of the parties as presented by the pleadings.

THE GENERAL QUESTIONS OF THE CASE.

FIRST.

The chief questions arising out of the bill and answers may be thus stated:

1. Is the case one of equitable jurisdiction?
Or, is an injunction the proper remedy of the complainant?

2. If he had originally an equitable remedy, was it not lost by delay and acquiescence?

3. Did the Board of Public Works, as respects the improvement on the Seventh-street road, and the assessment and certificate against the complainant's property, act or proceed illegally?

4. Was not the Board of Public Works a special or local tribunal, with limited and prescribed powers, requiring the exercise of judgment and discretion, the results of which equity would neither arrest nor disturb, even if they involved misconceptions of law, or other errors or irregularities?

5. If in any respect the Board of Public Works acted illegally, has not its action been ratified both by the Legislative Assembly of the District, and by Congress, so as to preclude a court from interfering with the collection of the certificate by injunction or otherwise?

6. Can the First National Bank of New York, as the *bona fide* purchaser and holder of the certificate issued against the complainant's property, be affected by any of the alleged equities of the case?

SECOND.

These general questions will be considered in their order.

a.

Is the case one in which equity has jurisdiction?

Is an injunction to restrain the collection of the assessment by the sale of real estate proper?

b.

This point is fundamental. If an injunction is not a proper remedy, the decree must be reversed.

c.

It becomes, then, important to inquire on what grounds the complainant has invoked the interference of equity.

1. The first is, that the improvement made was *entirely illegal*, and that therefore no part of the cost could be assessed against the complainant's or appellee's property.

> Bill Record, paragraph 5, pp. 2–4.
> *Ante*, pp. 10, 13.

2. That *if* the improvement was not totally illegal, it *was partly so*, and hence the appellee's property was only chargeable with the proportion of the cost which was legal.

> Bill Record, paragraph 6, p. 4.
> *Ante*, p. 13.

3. That there was *partial illegality*, because undesignated school and church property was exempted from assessment,

and the exempted amounts included in the assessment against the complainant's property.

Bill Record, paragraph 7, p. 4.

4. That the certificate issued against the appellee's property because of the general power of the Board of Public Works to make assessments is *apparently valid*, and operates to cast a cloud on his title.

Bill Record, paragraph 8, p. 4.

5. That while the proceedings of the Board were *wholly void*, the certificate issued constituted a lien, and the true character of it, or its total invalidity, could only be shown by extrinsic evidence.

Bill Record, paragraph 9, p. 5.

6. That the property of the appellee would be liable to sale, after the lapse of a year, on the certificate, and the deed would be a good and perfect title, and that, therefore, it should be procured and cancelled.

Bill Record, paragraph 10, p. 5.

7. That the Legislative Assembly of the District of Columbia was invested with a discretionary power to determine the reasonable part of the cost of improvements which should be assessed against individuals, and that it having failed to exercise the power, no assessment has been legally made or certificate legally issued.

Bill Record, paragraph 11, p. 6.

8. That the assessment was arbitrarily made, according to front feet, and without any other considerations, with-

out notice until after assessment; and therefore entirely void.

Bill Record, paragraph 11, p. 6.

THIRD.

a.

Total Illegality.

If the improvement and assessment and certificate were, as alleged, utterly illegal, would this justify an injunction?

It is too obvious to admit of dispute it would not. Let a few cases be cited.

Supreme Court of the United States.

* * * * * * * * * *

The case of Dow *vs.* Chicago was an application for an injunction to restrain the collection of a tax. It was met by a demurrer.

The unanimous opinion of the court by Fields, J., was in part as follows:

"According to the view we take of this case it is un-
"necessary to consider the force of any of the objections
"urged by the appellant to the decree rendered. Assuming
"the tax to be *illegal and void* we do not think any ground
"is presented by the bill justifying the interposition of a

" court of equity to enjoin its collection. The *illegality* " of the tax, and the threatened sale of the shares for its " payment constitute of themselves alone no ground for " such interposition. There must be some special circum- " stances attending a threatened injury of this kind, dis- " tinguishing it from a common trespass and bringing the " case under some recognized head of equity jurisdiction, " before the preventive remedy of injunction can be in- " voked.

* * * * *

" The equitable powers of the court can only be invoked " by the presentation of a case of equitable cognizance. " There can be no such case, at least in THE FEDERAL COURTS, " where there is a plain and adequate remedy at law, and " except where the special circumstance which we have " mentioned exists the party of whom an illegal tax is col- " lected have ordinarily ample remedy either by action " against the officer making the collection or the body to " whom the tax is paid. Here such remedy existed. If " the tax was *illegal* the plaintiff protesting against its " enforcement might have had his action, after it was paid, " against the officer or the city to recover back the money, " or he might have prosecuted either for his damages. No " irreparable injury would have followed to him from its " collection; nor would he have been compelled to resort " to a multiplicity of suits to determine his rights. His " entire claim might have been embraced in a single ac- " tion."

" We see no ground for the interposition of a court of " equity which would not equally justify such interference " in any case of threatened invasion of real or personal " property."

11 Wallace, pp. 109, 112.

This case is approved in Hannewickle *vs.* Georgetown. Hunt, J., in delivering the opinion of the court, says:

" The action in this case cannot be sustained. It has "been the settled law of the country for a great many "years that an injunction bill to restrain the collection of "a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of "fraud; that it creates a cloud upon the title; that there "is apprehension of multiplicity of suits, or some cause "presenting a case of equity jurisdiction. This was decided as early as the days of Chancellor Kent, in Movers "*vs*. Smedley, and has been so held from that time onward. The remedy was held to be at law by *writ certiorari* or by action of trespass."

It is added that "the whole subject has recently been examined in this court in Dows *vs*. The City of Chicago."

The syllabus of the case is in these words:

"A suit in equity will not lie to restrain the collection "of a tax on the sole ground that the tax is illegal. There "must exist, in addition, special circumstances bringing "the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead "to a multiplicity of suits or produce irreparable injury, "or where the property is real estate throw a cloud upon "the title of the complainant. The sole ground of the "present bill is the illegality of the tax.

"We are all of the opinion that the bill states no cause "of action, and that it was properly dismissed."

15 Wallace, p. 547.

In the earlier case of Ewing *vs*. City of St. Louis, the doctrine contained in Dow *vs*. Chicago and Hannewickle *vs*. Georgetown is clearly set forth, and the appropriate remedy of dissatisfied tax-payers pointed out.

The reporter says:

"This was a bill in equity, filed in the circuit court of "Missouri, to enjoin the enforcement of certain judgments "rendered against the complainant by the Mayor of St.

" Louis for the amount of alleged benefit to his property
" from the opening of Wash street, in that city."

Among the special averments of the bill were the following:

" That the said entry of judgment, *although of no legal*
" *validity*, nevertheless tends, and does materially injure
" and prejudice the complainants in this: that the said city,
" by its officers and agents, gives it out that the property
" *is liable to be sold*, &c., *insists* that the entry *is in legal*
" *effect a judgment*, and as such is *conclusive* against the
" complainant as evidence of debt, and the amount therein
" set forth to the said city, and that *the several parcels* of
" the complainants' property, in reference to which said
" assessments were made, *are bound and liable* for the
" payment of said alleged debt, to be sold on execution
" threatened to be issued on behalf of the city on the *pre-*
" *tended* judgment, by reason whereof the complainant is
" injured in the *use and enjoyment* of his said property,
" and hindered and prevented from *selling* and disposing
" thereof by reason of *the cloud* passed upon his title
" thereto."

The bill was demurred to.

In the argument the following point was made by Mr. T. Ewing, Jr., for the appellant:

" 1. This is a proper case for equity jurisdiction."

In reply, C. D. Drake, for the appellee, made the following points:

" 1. The case is not one for the exercise of the equitable
" jurisdiction of the court, because if the court could take
" jurisdiction at all of the revision of the mayor's proceed-
" ings, there is a plain, adequate, and complete remedy at
" law by *certiorari*.
" 2. The review and correction of all errors, mistakes,
" and abuses in the exercise of subordinate public jurisdic-

"tions, and in the official acts of public officers, belong "exclusively to a court of law, and has always been a "matter of legal and never of equitable cognizance."

The question of the jurisdiction of equity was thus directly made.

The court unanimously held that the bill of equity filed by the complainant was improper, and that the relief sought could not be allowed in equity.

Fields, J., in delivering the opinion of the court, says:

"These grounds (the allegations of the bill as given "above) are by the demurrer admitted to be true. Being "true, no reason exists upon which to justify the interference "of a court of equity. If the statutes and ordinances "under which the mayor undertook to act did not invest "him with any authority to render the judgment against "the complainant, the judgments were void, and would not "cast a cloud upon his title, or impair any remedies at "law provided for the protection of his property, or the "redress of trespass to it. On the other hand, if the "statutes and ordinances invested the mayor with authority "when new streets in the city were to be opened to "render judgments for the amount of benefits assessed "against the owners of adjoining property, and in this instance "he failed to follow their provisions, he *exceeded* the "jurisdiction they confer. The remedy of the complainant "was by *certiorari* at law, and not by bill in equity. * * "This is the general and well-established doctrine. Examples "in which this is asserted are found in The Mayor, "&c., of Brooklyn *vs.* Meserole, (26 Wendell, 132,) and in "Heywood *vs.* The City of Buffalo, (4 Kernan, 534,) and "in cases there cited. (See also Scott *vs.* Onderdonk, "*Id.*, 9.")

5 Wallace, p. 413.

The more recent utterances of the court will be found in—

In the opinion delivered by Miller, J., it is said:

"It has been repeatedly decided that neither the mere "illegality of the tax complained of, nor its injustice nor "irregularity, of themselves give the right to an injunc"tion in a court of equity. (Mooers *vs.* Smedley, 6 Johns. "Chy., 27; Dodd *vs.* Hartford, 26 Conn., 239; Green *vs.* "Mumford, 5 Rhode Island, 478; Messert *vs.* Supervisors "of Columbia, 50 Barbour, 190; Dow *vs.* Chicago, 11 "Wall., 108; Hannewinkle *vs.* Georgetown, 15 Wall., "548.")

Whatever may be the differences of opinion in State courts, it will be observed that none exists in the United States courts. Its decisions have been uniform that no injunction will be allowed on the mere allegations of the illegality of taxes or assessments.

In the case of Hepp *et al. vs.* Babin *et al.*, the court enunciate the general doctrine through Campbell, J.—

"That whenever a court of law is competent to take "cognizance of a right, and has power to proceed to a "judgment which affords a plain, adequate, and complete "remedy, without the aid of a court of equity, the plaintiff "must proceed at law."

And the court strongly maintains the importance of preserving the equity jurisdiction from an invasion of questions which may be determined at law, and says that this should be done, even if the parties do not raise the question of jurisdiction, by the court itself.
19 How., 271.

Partial Illegality.

b.

If *total* illegallity is insufficient to sustain the bill, can it be done by *partial* illegality ?

Certainly not. To maintain otherwise would indeed be little else than the absurdity that " the part is greater than " the whole ;" or that limited or restricted illegality could impart a jurisdiction beyond entire or complete illegality.

Indeed, the cases cited refer to either total or partial illegality ; and in the case of Heywood *vs.* City of Buffalo, mentioned with approval in *Ewing* vs. *City of St. Louis*, and other cases in this court—indeed, a leading case—the court says :

" If *partial* invalidity only is established," (or averred ?) " no case is made for the interposition of equity to remove " a cloud. It is no cloud, if the lien is to any extent valid."
14 New York, p. 541.

c.

Church and School Property—Its Non-Assessment a modified form of Partial Illegality.

But if partial illegality in one form is insufficient for the intervention of equity, is it sufficient in a different form ?

It is obvious that it is not. And it is manifest that the position assumed is that there is *partial illegality*, because of the exemption of church and school property ; or, in other terms, " an excessive assessment." But this, if true, will not sustain an injunction.

d.

Cloud on Title.

If neither total nor partial illegality will sustain the injunction, will the position that the certificate will cast a cloud on the title of the appellee's property ?

1.

What is a "cloud on title ?" It is a vague phrase. It relates exclusively to real estate.

It is more than a mere shadow, or obscuration ; it implies something fixed, settled, definite ; immovable by any ordinary effort, or means. It is not a mere doubt, fear, or suspicion, which by fair, prompt, or vigorous efforts may be removed.

2.

But it has been expressly decided by this court that a mere averment of a cloud on title will not necessarily authorize an injunction. This averment was distinctly made in Ewing *vs.* City of St. Louis, but it was disposed of thus :

> "These grounds are by the demurrer admitted to be true. " Being true, no reason exists upon which to justify the interference of a court of equity. If the statutes and ordinances under which the mayor undertook to act did *not* " *invest* him with any authority to render the judgment " against the complainant, the judgments *were void, and* " *would not cast a cloud* upon his title, or impair any remedies at law provided for the protection of his property, or " the redress of trespass to it. On the other hand, if the " statutes and ordinances invested the mayor with authority when new streets in the city were to be opened to

" render judgments for the amount of benefits assessed " against the owners of adjoining property, and in this instance *he failed to follow their provisions, he exceeded* the " jurisdiction they confer. The remedy of the complainant " was by *certiorari* at law, and not by bill in equity. * * " This is the general and well-established doctrine. Examples in which this is asserted are found in The Mayor, " &c., of Brooklyn *vs.* Meserole, (26 Wendell, 132,) and in " Heywood *vs.* The City of Buffalo, (4 Kernan, 534,) and " in cases there cited. (See also Scott *vs.* Onderdonk, " *Id.*, 9.)

5 Wallace, p. 413.

And in Henewinkle *vs.* Georgetown, (15 Wallace,) it is said:

" It has *long* been held, also, that there exists no cloud " upon the title which justifies the interference of a court " of equity where the proceedings are void upon their face; " that is, the same record which must be introduced to establish the title claimed will show that there is no title."

This confines interference as respects a cloud on title exclusively to cases where the alleged evidence is entirely *dehors* the records and proceedings, and defines what " void " on the face means."

STATE CASES.

But this matter has been fully and ably considered by different State courts.

NEW YORK.

The Mayor &c., of Brooklyn, *vs.* Meserole, is a leading case. The court says:

" 'The question, then, is, whether an illegality in the " proceedings, such as confessedly renders them inoperative and void, affords ground for the cognizance of a court

“ of equity, and makes it the duty of that court to interfere
“ and arrest them upon any acknowledged head of
“ jurisdiction. The ground set upon the bill and upon
“ which the chancellor has placed his opinion, is, that as
“ the proceedings operate upon the real estate of the complainants,
“ if persevered in, though they may not actually
“ affect the title, being void, they *tend to cast a cloud over*
“ *it*, which diminishes its value, and may be used as a
“ means of vexatious litigation.’ This, I admit, is now an
“ established ground of chancery proceeding in *particular*
“ cases, and it is material, therefore, to inquire whether the
“ case under review comes within it. It is not claimed as
“ a *universal* proposition that every act or proceeding by a
“ party that may tend to cast suspicion over the title, and
“ lead to litigation in a court of justice, can be properly
“ brought under this head; for the consequences would be
“ to draw all the litigation in the State concerning disputed
“ titles into the forum of equity. For instance, an heir
“ might set up a claim to an estate, accompanied with documentary
“ evidence of title and heirship, presenting a
“ colorable right to the land, which might seriously affect
“ the value to the occupant and threaten litigation, but no
“ lawyer would think of filing a bill for the purpose of
“ urging the right in a court of chancery and enjoining him
“ against the assertion of his title in a court of law.

“ There must, therefore, *be some limit, some circumscribed
“ boundary*, to the action of the court, even in cases
“ where the subject-matter presented may have the effect
“ of involving the title in doubt or litigation. Where
“ that lies exactly may be a question of some difficult solution.

* * * * * * *

“ The argument, as I understand it, is that although the
“ proceedings are void, not having been carried on in pursuance
“ of any law, and may not therefore affect the title
“ to the land, they *tend* to cast a doubt over it that must
“ necessarily diminish its value, if not entirely prevent a
“ sale; and as the court *sometimes* exercises its jurisdiction
“ for the purpose of *removing a cloud* from the title,
“ it may also in a proper case interpose to *prevent* the

"illegal act from which such cloud may necessarily arise. "(5 Paige, 501, 6 Id., 262.) The jurisdiction claimed, it "will be seen, is founded upon an inference deducted from "the previously established doctrine of the court, some- "what reluctantly applied, as we have seen, of removing "obstructions upon the title to real estate. But before "this inference, even if well founded, can afford any war- "rant for the interposition here, upon the principle assumed, "it must first be shown that the doctrine itself from which "the deduction is made has any application to the case "before us.

"Has a court of equity ever claimed or exercised the "right of inquiring into proceedings of subordinate tri- "bunals of special or local jurisdiction had either under "a statute of the common law, which may affect the own- "ers of real estate, with a view to set them aside, if void at "law, as an obstruction or cloud on the title? Unless this "general authority can be established none can be derived "by inference to interfere and prevent the proceedings, for "it is in vain to argue that the court may interpose and "arrest them if no authority exists to review and set them "aside after consummation. The principle, therefore, upon "which the court itself professed to go necessarily in- "volves the broad proposition that it possesses an inherent "and original jurisdiction to review and set aside, if illegal, "the proceedings of these subordinate tribunals, in all "cases and under all circumstances, where they operate, "directly or indirectly, upon the title to real estate.

* * * * * * *

"The case of Mooers *vs.* Smedley and others (6 Johns. "Ch. R., 28) directly affirms this doctrine. The bill was "filed to enjoin the collector of a town from collecting a "tax, and the supervisor from paying over the money, on "the ground that the board of supervisors had levied the "same in direct violation of law. But Chancellor Kent "refused to interfere, and in the course of his opinion ob- "served: 'I cannot find by any statute or precedent or "'practice that it belongs to the jurisdiction of chancery, "'as a court of equity, to review or control the determina- "'tion of the supervisors; but that the review and correc-

" 'tion of all errors, mistakes, and abuses in the exercise " 'of the powers of subordinate public jurisdictions, and " 'in the official acts of public officers, belongs to the Su- " 'preme Court. That it has always been a matter of " 'legal and never a matter of equitable cognizance;' and " that 'in the whole history of the English court of chan- " 'cery there is no instance of the assertion of such a juris- " 'diction as was then contended for.'

* * * * * * *

"The case stands upon the bald and naked ground of " the right of a court of equity to interfere and arrest the " proceedings on account of their tendency to cast doubts " and obstructions upon the title to the two strips of land " proposed to be taken for widening and extending the " Bedford road, and upon the adjacent territory assessed " for benefit—a doctrine that would at once bring under " the review of that court all that immense mass of pro- " ceedings in opening and widening streets and avenues in " our cities and villages, in laying out public and private " roads in our towns, and, in fine, the doings of every sub- " ordinate tribunal or public officer that might affect the " title to real estate. Any one familiar with this descrip- " tion of legal proceedings, carried on quietly and almost " daily in these subordinate jurisdictions, and extending " over every part of the territory of the State, will at once " realize the boundless field opened, and which, if the pre- " cedent be established by an affirmance of this decree, " that court will be driven irresistibly to enter, even if it " should itself be inclined hereafter to hesitate on review, " however overwhelming the new mass of litigation or " formidable the labor consequent upon it.

"I know the learned Chancellor has neither the desire " nor inclination to enter it, unless in obedience to a sense " of duty and the ancient jurisdiction of the court, follow- " ing where the footprints of his learned and distinguished " predecessors lead, and must believe that he has been sub- " dued and carried beyond the outer boundary of his court " by the hardship and injustice of the particular case. " These hard cases make bad precedents in the courts, both " of law and equity, and are usually found at the bottom

" of them. But it is satisfactory to know here, as has been " before stated, that upon the ground and principle of the " relief of the court below, the remedy of the party is still " open and complete.

" If the proceedings of the common council are void, it " will afford full redress both in respect to the unauthorized invasion of the lands by the officers and agents of " the corporation, or in case of an attempt to collect the " assessment out of the personal property. If they are not " void, then it is conceded the court had no power to interfere."

26 Wend. Rep., 135, 136–138, 139, 140.

In Haywood *vs.* City of Buffalo, it is said:

" The principal question in the case is whether the plaintiff is entitled to *this species* of relief; and if that shall be " determined against him it will be unnecessary to examine " the particular illegality specified. It was an appeal to " the equity powers of the court in which the action was " brought, and the relief sought was strictly of an equitable " character. In order, therefore, to give the plaintiff a " right to litigate the question on the equity side of the " court, and the court power to administer that species of " relief, it was necessary for him to *state in his complaint* " *facts* constituting an equitable cause of action. He was " bound to make out a case falling under some acknowledged head of equity jurisdiction. It is claimed that the " assessment is *a lien*, and being unauthorized *is a cloud* " upon the plaintiff's title which equity alone has power to " remove. It is also claimed that the court has the right " to interpose its equitable powers to restrain a collection " of a tax founded upon an illegal assessment. It is true " that such an assessment and tax is a *lien* upon real estate, and as such has preference over prior mortgages " and judgments. The charter (laws of 1853, 476, title 5, " sec. 12,) makes every unpaid tax and assessment a lien " upon the land on which it is assessed or charged, for two " years from that time, when the roll containing it was delivered to the receivers. (Mayor of New York *vs.* Col-

" gate, 2 Kern., 140.) This, of course, means a legal assessment.
"

"But an assessment made by a board or body having
" *no power* to make it is a nullity, and *no lien* upon any
" property. It is claimed, however, that such an assessment
" is an *apparent* lien, and should be removed as a
" cloud, for the reason that it is invalid. But the power
" of municipal and other inferior officers or bodies to make
" assessments is in law, and is apparent as the act of assessment,
" and if the assessment is *without* authority it
" is not even an *apparent* lien. If, however, such an assessment
" is to be regarded as an *apparent* lien, it does not
" follow that it is a cloud within the cognizance of a court
" of equity. The very point was adjudged against the
" power of the court in such case by the late court for the
" correction of errors, (The Mayor, &c., of Brooklyn, *vs.*
" Messerole, 26 Wend., 132,) reversing the decision of the
" chancellor in Van Doren *vs.* The Mayor, &c., of New
" York. (9 Paige, 388.) The relief sought by the bill in
" the case was identical with that demanded here.

" The bill was demurred to, and was dismissed on the
" express ground that the court had no power to afford the
" relief. The Chancellor, in delivering his opinion, says
" he understands that the court for the correction of errors
" in Messerole *vs.* The Mayor, &c., of Brooklyn, 'repudiated
" ' the idea that the court of chancery had any power or
" ' right to interfere in such cases, in relation to any supposed
" ' error or irregularity in the assessment, or in the
" ' proceedings of the corporation, or of the commissioners
" ' of estimate and assessment.' "

" The doctrine established by the decisions is substantially
" this: that *if* the proceedings are void upon their
" *face*, they form *no cloud* upon the title and no ground of
" interference by a court of equity. And if they are ***not***
" ***void*** upon their face, but merely ***voidable or irregular***,
" a court of equity will not take cognizance of them ***unless***
" other facts are alleged sufficient to bring the matter
" clearly within some acknowledged head of equity jurisdiction.
" This is a sound and salutary rule, which should
" be steadily adhered to, upon considerations of public
" interest and convenience, if no other. It is not the busi-

"ness of the courts to furnish new remedies to parties "aggrieved, even though existing ones are found inade"quate to afford perfect protection or redress. That falls "more properly within the province of the legislature. "But if they had the power, they would hesitate before "extending their equitable jurisdiction over all the acts of "these inferior bodies, and allowing every one assessed "to come in and litigate as to the validity of his tax before "he should be required to pay it who could allege some "error in making the assessment."

14 New York, 537.

Parker, J., in Van Rensselaer *vs.* Kidd, says:

"But the case before us is essentially of a different "character. The plaintiff asks this court to examine into "the *items* of each assessment and correct it, and to grant "equitable relief, on the ground that the returns are in"sufficient and show no authority for the issuing of war"rants I think these are matters *not* within the equitable "jurisdiction of this court. The case of Van Doren *vs.* "The Mayor of New York (9 Paige, 388) covers the whole "ground. If the proceedings *are void*, there is a *perfect* "remedy *at law*, and the defect appearing on the *face* of "the proceedings, there is not such a cloud upon the "plaintiff's title to lands affected by the warrant as can "authorize a court of equity to set aside or stay the pro"ceedings. If the proceedings are *not* void, but merely "*voidable* or *irregular*, the remedy of the plaintiff is not "in this court, which has no jurisdiction to grant relief. "(Morris *vs.* Smedly, 6 John. Ch. Rep., 28; 4 Id., 352; "Mayor of Brooklyn *vs.* Messerole, 26 Wend., 132; 1 "Paine, 114.)"

4 Barb., 19.

Strong, J., in Benton *vs.* the City of Brooklyn, says:

"If the assessment *is void* from want of the requisite "power to make it, it cannot constitute *a lien* upon the "plaintiff's real estate. It might, nevertheless, be a cloud "upon his title were it not for the fact that the objection,

" if any, is apparent on the face of the proceedings. They " show that the assessment was made by the street commissioner for grading a park, and if the statute gave *no* " *authority* for the procedure its nullity must be evident " to any one examining the papers, as all are supposed to " know the law. In such *cases* the court does not interpose to remove the cloud, because, if there be any, it is " so *thin* that it can do no serious injury. Besides it was " decided by both the late court of chancery and the court " of correction of errors that a court of equity will not, " even for the purpose of removing an alleged cloud, *review the proceedings of subordinate tribunals or municipal corporations.* (Mooers *vs.* Smedley, 6 John. Ch. " Rep., 28; Mayor, &c., of Brooklyn *vs.* Meserole, 26 " Wend., 132.) If it was competent for his court, under " the existing system, to extend its jurisdiction in this particular to that class of cases it would be *highly inexpedient* to do so, as it would constitute a source of excessive " and unnecessary litigation."

And Brown, J., says:

" The plaintiff next claims to have *the cloud* upon the " title of his lands created by the assessment removed by " a decree of the court. To entitle himself to relief upon " this ground he must *show* that the assessment, if regularly made by persons having authority for that purpose, " would constitute *a lien* upon the lands supposed to be " charged; that the proceedings are irregular, void, and " that the irregularity which vitiates them does *not* appear " upon the face of the *proceedings* themselves, but can " *only* be made to appear by facts, the evidence of which " is *outside and extrinsic* of the proceedings.

* * * * * * * * * *

RHODE ISLAND.

In the case of Greene vs. Mumford, collector, 2 Rhode Island Reports, pp. 474–78:

Ames, C. J.: " These are applications to us, as a court of

" equity, to enjoin the collector of taxes of Providence from " collecting of the complainant, in one case, a tax upon his " personal property, and of the complainants in the other, " a side-walk tax, soleely upon the ground, that the taxes " have been illegally assessed, and are therefore void. They " pretend no special equities as grounds for relief, but pro- " ceed upon the general notion, that wherever a public " officer is about to act to the injury of another, or at least " to sell his real estate under a void authority, a court of " equity will enjoin the act, on account of the greater jus- " tice which is done by preventing, than by afterwards " remedying the wrong.

" We do not understand that courts of equity take juris- " diction and enjoin upon any such loose and general no- " tions; which, if carried out, would take a vast number of " cases, turning upon legal rights only, out of the course of " the common law, and subject them to the peculiar prac- " tice and mode of trial of the chancery. Certainly, it is not " the mere fact that a public officer is attempting to exer- " cise a void authority which induces a court of equity to " restrain him; but, notwithstanding he is a public officer, " that he is about, by such exercise, to do an act which " brings the case within its peculiar jurisdiction; for exam- " ple, an act in breach of trust, in derogation of a contract " which ought to be specifically performed, or an act of " irreparable mischief to the real estate of another. The " jurisdiction is thus explained by Lord Cottenham, in " Attorney-General *vs.* Forbes, 2 M. & C., 123, 130–135, " in application to a public nuisance about to be committed " under an order of the quarter sessions of the county of " Berks; the authority of the magistrates being objected to " the interference of the court. It is true, that in Frewin " *vs.* Lewis, 4 M. & C., 249, S. C. 9 Sim., 6, in which he was " asked to enjoin the poor-law commissioners from exercis- " ing certain powers over property which were claimed to " be authorized, his language is more general, but the " notion conveyed is nevertheless the same; and that is, " that if public functionaries assume a power over property " which the law does not give them, a court of chancery no " longer considers them as acting under the authority of " their commission, but treats them, whether they be a

" corporation or individuals, merely as persons dealing " with property without legal authority. See also Adams, " Eq., 212, and cases cited.

" Treating then the tax collector in these cases, so far as " he acts without authority, as a person about to commit " an illegal act, what ground is there for the interference " of this court, considering the nature and consequences " of the act which he proposes to do. If, by any act done " under his warrant, the collector exceed its precept, he is " a trespasser, and liable as such. If the tax is illegal and " void and is extorted from the person rated by the duress " of the collector's warrant, it may be recovered back, with " interest, in assumpsit, from the city; or, if the tax-payer " choose, he may allow the collector to proceed under his " warrant, and treat the assessors who issued it as trespassers, and recover of them all damages done to him in " person or property under it. Pursuing these remedies, " which seem quite adequate, the questions of law which " arise in such a case are cheaply decided, as they should " be, by a court of law, and the questions of fact, as they " should be, by the verdict of a jury.

" It is said, however, that if the collector is allowed to " sell the real estate of the complainants for illegal taxes, " they run the risk of losing their land sold, and at all " events, a cloud is cast, as the common phrase is, upon " their titles to it; and it is true, that the cases of Van " Rensselaer *vs.* Kidd, 4 Barb. Sup. Ct. R., 17; Livingston " *vs.* Hollenbeck, Ib., 9; Sayre *vs.* Tompkins, 23 Missou., " (2 Jones,) 443, and Lockwood *vs.* St. Louis, 24 Ib., 20, " although they deny the propriety of the interference of " a court of equity with the collection of a void tax when " the person or personal property only is proceeded against, " seem to admit it when such a tax is attempted to be " levied upon the real estate of the person illegally rated.

" Looking at our system of tax laws, we do not see the " force of this distinction. The cloud upon title cast by a " sale under a void tax is too easily dispelled to occasion " injury, or even serious embarrassment; and the risk run " by a person who deems himself illegally taxed, if the " sale is allowed to proceed, is too small, in comparison " with the evils of such interference, to justify a court

" of equity, without special grounds, in enjoining the sale. " If the tax be really void, the title is not affected by the " sale made to satisfy it; and if the rated person does not " like the risk to run of its being void, he can pay it in " relief of his land, and, if successful in showing its in- " validity, recover it back, with interest, in an action of " assumpsit. But if such payment be, from any cause, " inconvenient, the risk he runs is reduced by our statute " to this, that in the event he is mistaken as to the invalid- " ity of the tax, he, 'his heirs, assigns, or devisees' will " be obliged to redeem the land sold 'upon repaying to " the purchaser the amount paid therefor, with twenty " per cent. in addition, within one year after the sale, or " within six months after final judgment has been rendered " in any suit in which the validity of the sale is in ques- " tion, provided said suit be commenced within one year " after such sale.' If we take into consideration, that, by " the 11th section of the same chapter of the Revised " Statutes, 'so much' only of the land liable to taxes is " to be sold by the collector 'as is necessary to pay the " tax, interest, costs, and expenses,' it is seen that the " cloud upon title cast by a tax sale may, in the worst event " for the tax-payer, be dispelled by redemption, at a far " easier rate than by the additional expenses of a suit in " equity over those of a suit at law, especially if, as would " be the strict course where a mere legal right was in " question, disputed facts were to be settled by verdict, " upon an issue directed to a court of law.

" On the other hand, if we sustain such bills as these " what must be the consequence? Constant application to " this court to enjoin collectors of taxes, upon the ground " of illegal assessment, at great expense, and with great " vexation and delay, in a class of cases too in which the " law, from motives of public convenience, not to say ne- " cessity, has studiously made the ordinary proceedings as " short, as simple, as cheap, and effectual as possible. It " has been argued to us, indeed, that because no special " remedy is provided by statute for cases of illegal and " void assessment, we should adopt this, though the most " expensive and dilatory. We do not feel the force of the " argument, considering the opposite scope of the general

" policy and the minute provisions of our tax laws. In
" case of a petition by way of appeal from an over-valua-
" tion of the rated estate of a taxpayer, the 11th section of
" ch. 39 of the Revised Statutes expressly provides that 'no
" 'such petition shall, before judgment, stay any proceed-
" 'ings for collecting the tax.' Still less are we, before
" judgment at law, as has been done in one of these cases,
" to stay the collection of a tax upon the ground that it
" may have been illegally assessed, and by entertaining in
" this form mere questions of law, unnecessarily to substi-
" tute, in effect, the most cumbrous and expensive for the
" most cheap and expeditious mode of collecting taxes, to
" the great burden of taxpayers and collectors of taxes, and
" to the great inconvenience of the public.

" Nor do we feel the force of the distinction attempted,
" upon the Ohio cases, between equitable interference in
" case of a general and in case of a special town or city
" tax. Both derive their authority from the same source,
" and are necessary, in legal presumption, for proper mu-
" nicipal police. Though assessed in a different mode and
" upon a different principle, and by a different set of officers,
" both are ultimately collected in the same manner; nor do
" we see how the threatened sale, or sale, of his real estate
" for the collection of the one can be more injurious to the
" person illegally assessed than for the collection of the
" other. As we have seen, a court of equity, in consider-
" ing whether it shall interfere with the illegal acts of
" public officers or *quasi* public officers over property, does
" not look to the special mode in which their authority is
" conferred; since, so far as they exceed their commission,
" it treats them as persons dealing with property without
" any authority whatsoever. It looks only to the nature
" and consequences of their illegal acts done or proposed
" to be done; and, in view of the sufficiency of legal reme-
" dies for a mere legal wrong, balances the advantages
" against the disadvantages of its interfering by its extraordi-
" nary power of injunction. If it is clear that more harm than
" good will be done in a novel case by such interference, it
" will stay, and ought to stay, its hand—not denying rem-
" edy, but leaving the injured party to his remedy at the
" common law. Judging by these tests, we can see no

" more propriety for our enjoining the collection of a side-
" walk tax than of a general tax.

" In conclusion, although we will not say that in no case
" that may occur will we, as a court of equity, stay the
" collection of an illegal town or city tax, yet we do say
" that we will not do it as against a single taxpayer, upon
" the mere ground that it is illegally assessed upon him,
" without special equities, and when, as in the cases before
" us, the law affords a far better and more appropriate
" remedy, in view of his rights and necessities and those of
" the public, than any which we on this side of the court
" can administer."

From these cases it is manifest (1) that the simple averment of cloud on title cannot support the bill. If, as alleged, the action of the Board of Public Works was entirely illegal, "no cloud" could arise to sanction the interference of equity. And (2) if, on the other hand, its assessments and certificates were only partly illegal, *certiorari* was the proper remedy.

Moreover, (3,) "the cloud," if any existed, is "too thin," too easily removed, to allow of the intervention of equity.

e.

The Deed as a good and perfect Title.

But if the *mere* averments of "cloud on title" are not enough to authorize an injunction, can the additional fact do so that a deed is made by the act of the Legislative Assembly "a good and perfect title" to any property bought at any *authorized* sale?

Or, in other terms, does this increase the cloud of the certificate to an extent which requires equity to interpose?

The answer must be in the negative.

And the authorities cited fully sustain the answer.

In the case of Harkness *et al.* *vs.* Board of Public Works, the Supreme Court of the District of Columbia passed on this point.

The opinion was delivered by MacArthur, J., in these words:

"We are also asked to restrain an attempt to issue these "certificates, for the reason that if the property upon "which the assessment is made be sold for the non-payment thereof, as provided for in said act of assembly, "the deed would be *conclusive* evidence of title. The language of the act in this respect is as follows: 'Which "deed shall be deemed and held to be a good and perfect "title to any property bought at any sale hereby authorized.' It is contended that a tax-deed under this provision would be conclusive that all the requirements of "the law had been complied with, and that in such case "the complainants have no other remedy. Even if the "deed had this effect, the complainants would have the "right of *certiorari*, and of *recovering* back the amount of "their assessment, if paid under protest. It has been repeatedly decided that the tax-payer is entitled to both "of these remedies at law. But we are not inclined to "adopt this construction of the statute. It is a familiar "principle of law that a purchaser at a tax-sale must *prove* "the irregularity of the proceedings from the beginning "to the time of the sale. He must prove that all the requirements of the law have been complied with; and "we are inclined to the opinion that the assembly only "meant to declare the title perfect when the proceedings "had been in accordance with the statute. In many of "the States a tax-deed has been made presumptive evidence of regularity, thus changing the burden of proof "from the claimant under such a deed to the owner of the "land; but I am not aware that it has been made conclusive evidence of all the facts necessary in assessing or "taxing lands anywhere. And certainly we ought to require clearer language than that employed in this statute "to work a change so radical. Upon the whole we are of "opinion that, upon the showing of the bill, we cannot

" interpose upon the ground of a threatened cloud upon " title."

1 MacArthur, pp. 130, 131.

And this is in harmony with the opinion of the court in Williams *vs.* Kirtland, 13 Wallace, 306.

The action was ejectment on Minnesota. The plaintiff claimed under a " tax deed." Among other provisions the statutes of the State, of 1862, declared that a deed in fee simple should be executed for lands sold for taxes, and that the deed " should vest in the grantee an absolute title " both at law and equity, except where the tax returned " delinquent was actually paid."

And a statute of 1866, that a deed should be *prima facie* evidence of a good and valid title. And the court, per Field, J., says: " There is one error in the ruling of " the court below which will require a reversal of the " judgment. Giving to the deed full effect, as *prima* " *facie* evidence of title, its *validity* was open to question " by the defendant. The statute does not dispense with " the performance of all the requirements of the law " prescribed for the sale of lands. It only shifts the " burden of proof of such compliance from the party " claiming under the deed to the party attacking it. The " deed itself, when admitted, creates, under the statute, " a *presumption* that all essential preliminary steps in " the assessment and levy of the tax and sale of the property has been complied with. This presumption the " defendant desire to rebut. He offered to prove that *the* " *notice* of sale was insufficient, but the offer was rejected " under the objection that the proof was incompetent and " immaterial. In this the court below erred."

13 Wallace, p. 310.

But there are various and pertinent State cases. Some of these are referred to in Blackwell's Tax Title, pp. 81–83, "By the act of February 19, 1827, the Illinois legislature declared that the deed should 'vest a perfect title in the purchaser, unless the land shall be redeemed according to law, or the former owner shall show that the taxes for which it was sold had been actually paid according to law, or that the land was not legally subject to taxation.'

"In Garrett *vs.* Wiggins, the supreme court of that State, in giving a construction to this statute, state the rule of the common law as to the burden of proof, and the strictness required in this class of cases, concede the power of the legislature to alter these rules, admit that it has done so to some extent in this very instance; that under this statute several preliminary facts to a legal sale by the auditor are to be inferred by his conveyance, and the responsibility of proof shifted from the purchaser to the original owner, but the court deny that this statute will, 'by any fair construction, warrant the opinion that the auditor, selling land without authority, could, by his conveyance, transfer the title of the rightful owner.' They say that to consummate his authority, the law imperatively requires him to publish notice of the time and place of sale, that the publication of this notice is not one of those facts which can be inferred from his conveyance, and that, without proof of this fact, the auditor's deed is not evidence of the regularity and legality of the sale, and consequently conveyed no title to the purchaser.

"The Michigan statute of April 13, 1827, declares that the tax-deed shall vest in the purchaser 'an absolute estate in fee-simple,' &c., and be 'conclusive evidence that the sale was regular according to the provisions of this act.' On the construction of this statute the supreme court of that State have twice held that the tax-deed was only conclusive evidence that the sale itself was made, at the time and place, and was conducted by the person and in the manner prescribed by law; but that it was still inadmissible in evidence, unless accompanied by proof that the taxes had been legally assessed and returned, and that all of the proceedings, anterior to the

" sale, had been in strict conformity with the requirements
" of the statute.

"One of the New York statutes declares that the comptroller's deed shall be 'conclusive evidence of the regularity of the sale;' but the courts of that State hold this relates solely to the auction and notice of sale, and does not dispense with proofs of the other prerequisites of the law; in other words, the deed is evidence of the regularity of the comptroller's sale, but not of his power to sell. Another statute of that State declared that the deed 'shall vest in the grantee an absolute estate in fee-simple.' These words were held to be merely descriptive of the estate which the purchaser would acquire under the statute, where the authority of the officer to sell has been established by proof that all the requirements of that statute had been fully complied with."

The doctrine of these cases is sustained by authorities cited in Cooley on Taxation, pp. 354–355.

And it is said, after referring to different cases:

"So a statute which makes the deed evidence of a title in fee simple in the owner is held to be evidence only of such a title after the right to give the deed has been shown by the proof of anterior proceedings that support it."

The deed, it is then manifest, is not conclusive of title; can not be, and no force is thus added to the case by the provision of the act of the Legislative Assembly as to the character of a deed.

It remains true, notwithstanding this provision, that it must appear in any action to "obtain possession" of "sold property" that the sale was "*authorized*" and proper.

So that neither on the ground of the character of the deed, nor on this, combined with others, can equity have jurisdiction.

f.

Extrinsic Evidence.

But is a resort to equity sustained by the position that *extrinsic evidence* will be required to show the alleged actual invalidity of the assessment and certificate, apparently or on their face, correct?

What is extrinsic evidence? It is such as is not in any way connected with the law, or written or printed papers or proceedings. It consists of facts outside of these.

And what is it assumed that this evidence will establish? The *total* invalidity of the assessment and certificate—no more, no less.

But if this could be shown, the case would by this fact be excluded from the control of equity.

It would be placed on the exclusive ground of illegality. For there is no pretence that the assumed extrinsic evidence would establish fraud, inequality, or irreparable injury, but simply that " the proceedings " of the Board of Public Works " were WHOLLY VOID," while apparently correct or valid.

(2)

But it is unquestionable that the Board of Public Works was created by the 37th section of the act of Congress of February 21, 1871; and from that and acts of the Legislative Assembly, especially of August 10, 1871, derived its functions.

Its " powers," therefore, are " in the written law; and its " acts in its records; and hence extrinsic evidence could " not be required to show that it acted " outside of law or in violation of law.

(3)

Nor is this all. No mere *general* averment of the existence of extrinsic evidence is sufficient to give equity jurisdiction.

The averment here is, that, "by reason of matter not on "the face of the proceedings, which can be established by "*extrinsic evidence*," the assessment is wholy void.

What the matter or pretended matter is, is not stated. It rests on the "*belief*" of the complainant; it is only a general assertion or "conclusion of law."

That this is wholly insufficient must be at once manifest, and that it is so appears from various cases and text-books.

Story says:

"It is an elementary rule of the most extensive influ- "ence that the bill should state the right, title, or claim of "the plaintiff with accuracy and clearness, and that it "should in like manner state the injury or grievance of "which he complains, and the relief which he asks of the "court. In other words, there must be such *certainty* in "the averment of the claim upon which the bill is founded "that the defendant may be *distinctly* informed of *the na- "ture* of the case which he is called upon to meet. The "other material fact ought also to be plainly, yet suc- "cintly, alleged, and with all necessary and convenient "certainty as to the essential circumstances of time, place, "manner, and other incidents."

Story Eq. Pl., § 241.

CALIFORNIA.

In the case of Ritter *vs.* Patch, tax collector, Baldwin, J., delivering the opinion of the court, (Terry, C. J., concurring,) says:

"Waiving other obstacles of a very serious import which "oppose the plaintiff's proceeding, we think that the *bill "states no sufficient ground* for equitable interposition.

" The remedy by injunction is unauthorized in cases like
" this, except where the injury is irreparable, if, indeed,
" that furnishes a sufficient ground for interference. This
" must appear in the bill by some issuable averment, and
" be sustained, if denied at the hearing. The New York
" cases (1 Abbott, 4; *Ib.*, 79; *Ib.*, 250) go much further
" than it is necessary for us to go in this respect. But if
" the principle contended for be adopted, chancery might
" restrain, for anything we can see to the contrary, every
" threatened, unauthorized invasion of real or personal
" property. This would be to throw into chancery a great
" portion of all the torts committed or threatened."

12 California, 299.

In Bouton *vs.* City of Brooklyn, Brow, J., says:

"The plaintiff charges 'that *many* of the facts showing
" 'the irregularity in the proceedings to impose the alleged
" 'assessment and the invalidity thereof *will not appear*
" 'upon the face of the papers or proceeding necessary to
" 'establish such lien, and can only be shown by testi-
" 'mony outside and extrinsic of such papers and proceed-
" 'ings.' He nowhere points out *what* the irregularities
" are to which he alludes. And if the complainant had
" rested upon this general charge alone it must have been
" adjudged bad on demurrer, for, to make out a case of
" equitable cognizance, he was bound to charge *specifi-*
" *cally* in what particulars he deemed the proceedings
" irregular."

15 Barb., 396.

But, if possible, in Heywood *vs.* City of Buffalo, the necessity of stating the particular facts is more clearly declared:

"The general rule established by the decisions seems
" to be subject to three exceptions. First: Where the
" proceeding in the subordinate tribunal will NECESSARILY
" lead to a multiplicity of actions. Second: Where they
" lead, in their execution, to the commission of *irreparable*

" injury to the freehold. Third: Where the claims of the
" adverse party to the land is valid upon the face of the
" instrument or the proceedings sought to be set aside,
" and extrinsic facts are necessary to be proved in order
" to establish the invalidity or illegality. Whenever a case
" *is made by the pleadings* falling within these exceptions,
" or either of them, equity will interfere to arrest the ex-
" cessive litigation, or prevent the irreparable injury, or
" remove the cloud from the title. The plaintiff's counsel
" seeks, in his submitted argument, to bring this case with-
" in one or all of these exceptions. But I think he has
" *entirely failed to bring it within either exception by his*
" *complaint.* There can be no pretence that additional
" suits are to be prevented by a judgment in the plaintiff's
" favor in this action. It is brought for the benefit of no
" one except himself. Nor is it shown by the complaint,
" nor can it be, how the assessment and levy of a tax
" merely, even if *entirely illegal*, could work irreparable
" injury, or any injury, to the freehold. They might,
" should the tax be collected, work an injury to the plain-
" tiff by depriving him of his property, but could work *no*
" *injury* to the freehold. In order to bring the case with-
" in the third exception, and the jurisdiction of equity on
" that ground, the complaint should have *set out in terms*
" the resolution of the common council upon which the
" assessment was based, that the court might see whether
" it was apparently within the jurisdiction of that body,
" or it should have alleged distinctly and plainly that the
" proceedings were apparently within the powers of the
" common council, and upon their face were valid and cre-
" ated a valid lien, and it should *then* have alleged that, not-
" withstanding such apparent validity, the proceedings were
" wholly void by reason of *certain extrinsic matters, which*
" *should be stated*, and which it should *appear*, *by the*
" *complaint*, *could only* be established by other evidence.
" These facts are the very grounds of the jurisdiction."

14 New York, 541.

In Washington Railroad *vs.* Bradley, the court, per Swayne, J., says:

> "It is hardly necessary to repeat the axioms in the "equity law of procedure that the allegations and proofs "must agree; that the court can consider only what is "put *in issue* by the pleadings; that averments *without* "*proofs* and *proofs* without averments are alike unavailing, and that the decree must conform to the scope and "object of the prayer, and cannot go beyond them."
>
> 10 Wall., 303.

From these authorities it is clear there is no allegation of extrinsic evidence sufficient to sustain the case. Particular facts must be stated, that a court may "see the matter for "itself." Vague and general allegations of "extrinsic "evidence" are useless.*

g.

But *if* the Legislative Assembly was invested with a discretionary power to determine what should be a reasonable part of the cost of the improvement, and failed to do so, would this give a court of equity power to restrain the collection of an assessment, or prevent a sale of property on the certificate issued against it?

It is maintained that it would. But *how* could it? It was, at the utmost, a simple neglect to exercise an authorized power. And, moreover, the only effect of this would be an irregularity or incidental illegality. And such illeality no more than that which might be direct and flagrant could "place the case in the realm of equity."

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*And this is equally true of "cloud on title" and all other averments.

And what, if it were true, that the assessments were arbitrarily made, in reference to front feet, without any other considerations, and without notice?

This would not constitute a ground for equitable interference. It, too, is a position of illegality; not as respects the powers of the Board of Public Works, or authority to make the improvement, but as respects its mode of "fixing "the amount due," or to be assessed against the complainant or appellee's real estate.

This, and indeed the other positions of the bill, may be answered in the words of this court by Miller, J., in the State railroad tax cases. After quoting from Dow *vs.* Chicago and Hennewinkle *vs.* Georgetown, it is said:

"We do not propose to lay down in these cases any "*absolute* limitation of the powers of a court of equity in "restraining the collection of illegal taxes; but we may "say that, *in addition* to illegality, hardship, or irregu-"larity, the case *must* be brought within some of the "recognized *foundations* of equitable jurisdiction, and "that mere errors or excess in valuation, or hardship or "injustice of the law, or *any* grievance which can be "remedied by a suit at law, *either before or after* pay-"ment of taxes, will not justify a court of equity to inter-"pose by injunction to stay collection of a tax."
2 Otto, p. 614.

And in 2 Dillon on Munc. Cor., sec. 727, it is said:

"Equity will sometimes interfere to prevent the munici-"pal authorities from transcending or from making an "illegal use of their powers, and relieve against their un-"authorized or illegal acts; but on a principle well known "in our jurisprudence there must be some reason to justify "a resort to this jurisdiction, such as the want of an ade-"quate remedy at law, multiplicity of suit, irreparable "injury, breach of trust, or the like. Usually the question

" whether municipal and public corporations are acting or " have acted within the limits of authority which the law " confers upon them involves an examination of purely " legal principles, unmixed with equity. Therefore, in " general, the court of chancery has no jurisdiction to re- " strain, review, or set aside, even if irregular or illegal, " the proceedings of such a corporation. This jurisdiction, " belongs, except in special cases, which will be mentioned, " to the supervisory power and control of common law " courts."

And in note 1, p. 820, the author adds:

" In federal courts it is well known there can be no case " of equitable cognizance where there is a plain and ade- " quate remedy at law. (*Ib.*, Ewing *vs.* St. Louis, 5 Wall., " 413; citing with approval Mayor, &c., *vs.* Meserole, and " Heywood *vs.* Buffalo, above mentioned; Hannewinkle " *vs.* Georgetown, 15 Wall., 547.)"

It is thus appparent, both from principles and authorities, that the bill of this case presents no sufficient considerations for the interference of equity; and the court below overlooked or disregarded the harmonious decision of this court in making the injunction perpetual and restraining the collection of the assessment against the appellee's property.

To add more on this primary and apparently controlling question would be useless.

FOURTH.

Estoppel by Acquiescence and Delay.

But if the appellee originally might have invoked the aid or interposition of equity, did he not deprive himself of this right by acquiescence with the improvement and delay in presenting objections to it, and the assessment and certificate made and issued against his property?

a.

What are the facts? The Board of Public Works was created by Congress, existed, with control over the streets, avenues, etc. The bill (Exhibit C, Record, pp. 8–11) declares the fact that as early as June 20, 1871, the improvement of "Seventh-street road" was contemplated and a matter of "common and public notoriety." This appears from a communication of the Board of Public Works addressed to the Legislative Assembly. This was followed by an act of July 10, 1871, authorizing the proposed improvement—or, more correctly, making appropriations, among other things, "for roads."

Record bill, paragraph 5, p. 3.

Subsequently there was an act of the Legislative Assembly passed, appropriating $5,000,000.00 for "the improvement and repair of streets, avenues, alleys, AND ROADS, and for bridges, sewers, and other public works."

This act was approved August 11, 1871.

In the meantime, the act of August 10, 1871, providing for the mode of assessments, issuing of certificates, etc., was passed.

The improvement progressed, was completed, an assessment made "in the mode" required by the act of the 10th of August, 1871, the appellee notified of it, the notice disregarded, a certificate made out and issued, and ultimately transferred to the First National Bank.

How, after all this, could the appellee be allowed by equity to dispute the legality or irregularity of the assessment and certificate?

The general doctrine is thus stated for this court by Clifford, J., in Swain *vs.* Seamens, 9 Wall., p. 272:

"Where a person tacitly encourages an act to be done, " he cannot afterward exercise his legal right in opposition " to such consent, if his conduct or acts of encouragement " induced the other party to change his position so that he " will be pecuniarily prejudiced by the assertion of such " adversary claim."

But there are numerous pertinent State cases, a few of which may be cited.

INDIANA.

In the City of Lafayette and others *vs.* Fowler and others, the supreme court of Indiana, through Downey, J., says:

"Another position in this case which is assumed by the " appellant is that the property-owners could not stand by " and see the improvements made without making any " effort, by injunction, to prevent it, and then after the " work is done, or nearly done, refuse to pay for it. This " rule has been applied by this court in several cases very " similar to this one."

Hellenkamp *vs.* The City of Lafayette, 30 Ind., 192.
Palmer *vs.* Stump, 29 Ind., 329.
34 Ind., 146.

ILLINOIS.

Walker, J., in City of Peoria, says:

"It is a rule of uniform application that where a party " has a complete remedy at law, and, having an opportu" nity, slumbers upon his rights, and fails to insist upon " it, a court of equity will not afford relief."

26 Ill., p. 358.

CALIFORNIA.

In Weber *vs.* City of San Francisco, Bennet, J., says:

"An assessment was laid on property in the city of San " Francisco, owned or claimed by the plaintiff, for the pur- " pose of improving a street. The common council of the " city passed an ordinance directing the improvement to be " made, and after its completion the plaintiff filed his com- " plaint in the superior court, claiming that the assessment " was, for numerous causes, unauthorized and illegal. An " injunction was accordingly granted, to prevent the sale " of the plaintiff's land by the defendants. Upon the " hearing of the cause, the superior court rendered judg- " ment that the injunction should be dissolved, and that in " case of non-payment of the assessment within ten days, " the land should be sold under the decree of the court. " * * * * * The plaintiff asks for the equitable in- " terposition of the court, to prevent a sale of his land by " the defendants; but every principle of equity and justice " demands that the plaintiff should pay, and it is one of " the first maxims of equity jurisprudence that he who " asks equity must do equity. (1 Story Eq. Juris., sec. " 64; Francis' Max., 1.)

* * * * * * * * * *

* * * "Had the plaintiff instituted his proceedings " before the work was commenced, and enjoined the city " from making the improvement, I should have felt it " necessary to inquire into the validity of the ordinance by " virtue of which the assessment was made and sale " ordered, and into the powers of the common council, un- " der the charter, to make the assessment in the way they " did make it. As the case now comes up, I do not deem " this inquiry necessary."

1 Cal., 455.

OHIO.

In Kellogg *vs.* Ely, the opinion by Breckeroff, C. J.:

" We do not find it necessary to determine any one of

" the many questions made and argued by counsel in the
" case as to the legality or illegality of the proceedings by
" which this ditch was established, because if we take for
" granted all that the plaintiff below claims in this respect
" we are of opinion that he does not make such a case as
" to entitle him to a remedy by injunction at the hands of
" a court of equity. It is not for every threatened viola-
" tion of the legal rights of a party that a court of equity
" will intervene with its preventive remedy by injunction
" even in case where that remedy would be efficient. A
" party appealing to a court of equity must make a case
" which can commend itself to the conscience of the court.

" How is it with the case before us made up by the
" plaintiff below ?

" It is evident enough that when the proceedings in the
" probate court on inquiring of damages claimed by him
" were ended, the plaintiff below might have proceeded on
" error to test their legality, and if erroneous to reverse
" them. And when the final order establishing the ditch
" was made by the county commissioners he might then
" have proceeded on error or by appeal to question their
" power and jurisdiction, and to undo what may have been
" erroneously done. And these remedies if they had been
" resorted to would have had these important recommenda-
" tions : That whatever had been done erroneously or with-
" out authority of law would have been set aside. Officers
" would have been instructed as to their rights, and pro-
" ceedings, recommencing from the erroneous point of de-
" parture, would have been carried on in strict conformity
" of law, with all just interests respected, and all rights
" conserved. But it does not appear that any resort was
" had to these remedies.

" Again, when the different sections of this ditch were
" let to the lowest bidder, and when the first spade had
" been thrust into the earth in the execution of the con-
" tract then made, before the contractors had expended any
" money or the laborers any sweat, then, if ever, the rem-
" edy by injunction was open to the plaintiff below. But
" then he did not invoke it. It does not appear from the
" record that he ever warned the contractors or laborers

" that he intended for himself to resist the collection of " the assessment which must follow to raise the money to " pay them; but, remaining inactive and silent until his " swamp lands were drained by a ditch of nearly a mile in " length, he then, for the first time, asks the interposition " of a court of equity. We think he comes too late. The " case of Wiggin *vs* The Mayor, &c., of New York, (9 " Paige, 24,) was a case in which an injunction was sought " to restrain a city corporation from the enforcement of an " assessment levied to pay for the improvement of a street, " and the remarks of Chancellor Walworth in that case " are very pertinent here. He says: 'There is another " 'substantial reason why this court should not interfere " 'in this case by injunction to prevent the corporation " 'from collecting the assessment, but should leave the " 'complainant, if he has any, to his remedy at law.' The " proceedings for the making of the improvements were " commenced nearly five years since, and the complainant " had waited until the improvement had actually been completed several months before he or his agent attempted " to interfere.

" His property has received the full benefit that it could " receive from the improvement, which benefit the commissioners have estimated at several thousand dollars. A " court of equity, therefore, at this late day, will not " interfere with its strong arm to cast the burden of the " improvement from those who have been benefited thereby, and upon those who have not."

" And in Chapman & Harkness *vs.* The Mad River & L. " E. R. R. Co., 6 Ohio St. Rep., 137–'38. This refused the " remedy by injunction, on the ground of the unnecessary " delay of the party seeking it until the expense of constructing the work complained of had been incurred."

15 Ohio St. Rep., 66, 67, 68.

NEW YORK.

The People *vs.* The Common Council of Utica. The opinion was delivered by Smith, J.:

" The relator, and those in whose behalf as well as his "the writ was sued out, have lain by and seen the work "constructed upon their street, for the benefit of their "property, and should be estopped from questioning the "right of the city to make such improvement, in analogy "to the rule in equity, that when a party lies by and sees "another make valuable erections and improvements on "his land, supposing he is making them upon his own land, "he shall be estopped from afterwards setting up his title "to the land so improved. The common council are in "principle and in fact nothing more than agents of the "property-owners in cities in making such improvements; "and when the property-owners benefited thereby suffer "the improvements to proceed and be completed, they "should be held to have affirmed the acts of their agents "in constructing such work. As in other cases between "principal and agent, where the trustees of public or private "corporations act for the benefit of particular individuals, "such individuals, if they seek to disaffirm and avoid such "acts, should take prompt steps to do so, or they will be "held to have affirmed the same. (Story *vs.* Furman, 25 "N. Y., 230.)

65 Barb. Sup. Ct. Rep., 21, 22.

If the principles of these cases are correct, the appellee, if he had "a standing in equity," surrendered it. And on March 2, 1874, it was too late for him to invoke its interference.

The work was completed long before--in actual use--without objection, the assessment had been made, the certificate issued, and the Bank had become "the *bona fide* holder." Equity cannot, "in view of all the facts," afford any assistance to the appellee.

He "slumbered too long" on his rights, if he had any.

h.

But did the Board of Public Works, as respects the Seventh-street road and the assessment and certificate against the appellee's property, in any respect act illegally ?

(1.)

It is persistently asserted that it did. But it is only an assertion.

(2.)

That the Board had a legal existence, and that, by the 37th section of the act of Congress of February 21, 1871, it was given "entire control of the streets, avenues, "alleys, and sewers," and authorized to make all necessary regulations for their repair, cannot be disputed. That this control and power could include "all other work" entrusted to it by the Legislative Assembly cannot be denied. And that, besides, the Board was authorized to make disbursement of moneys appropriated or "collected from property-holders" for the improvement of streets, avenues, alleys, and sewers and ROADS and bridges, and to assess against individual property adjoining and especially benefited by an improvement an amount not exceeding one-third of the cost, is certain.

Now, beyond assertion, what is there to show that the Board of Public Works disregarded or transcended any one of these powers ? Not anything. And each assertion is directly denied.

(3.)

But further. Did Congress authorize the Legislative Assembly to entrust the roads of the District to the Board of Public Works for the purposes of improvement ? It did. And the Legislative Assembly on July 10, 1871, expressly authorized the improvement of roads—*and of the Seventh-street road.*

And on the 11th of August additional authority was conferred.

Did Congress authorize the board to assess against property adjoining and especially benefited by an improvement a proportion of the cost, not exceeding one-third? It did. Authorized to improve the "Seventh-street road," the Board of Public Works did so, and on its completion assessed *less* than one-third of the cost against the "property-owners." It is not pretended that the assessment against the appellee's property is in excess of a due proportion of one-third of the entire cost.

Did Congress direct that the assessment should be made in "SUCH MANNER as should be prescribed by law?"

It did. The act of the Legislative Assembly of August 10, 1871, is entitled "An act prescribing THE MODE of assessment for special improvements, and providing for the collection thereof," and requires a *distinctive manner* of assessment, viz.: that upon the completion of an improvement a statement of the whole cost should be *prepared* by the Board of Public Works and *filed* in its office, and that, with this statement as a basis, it should be ascertained—with a reference to the benefit derived from the improvement, and of necessity to the quantity of property owned by individuals—how much, within the limit of one-third of the entire cost, should be charged against each piece of property.

And this plain and just method was pursued by the Board of Public Works. And by this mode the assessment was made by the appellee.

Did Congress provide that the assessment should be collected, "*as*" (*i. e.*) in the same manner as all other taxes are collected? It did.

And the Legislative Assembly provided that if an assessment was not paid a certificate of indebtedness should be issued against the assessed property, bearing interest, until paid, at the rate of ten per centum per annum, and be a lien; and that if after a year the certificate remained unpaid, at the request of the holder the benefited and charged property should be sold, and a deed made to the purchaser; the owner having a right of redemption for two years.

By this act an efficient mode of collection, in harmony with the established modes of the District "for the collection of all other taxes, was adopted. It was, in brief, by issuing certificates of indebtedness; and in the event of a refusal or neglect to pay, of sale of the assessed property.

How, then, can it be maintained that the Board acted in any important particular illegally or even irregularly?

Certainly any tranquil examination of the law or facts will sustain the proceedings. They are only assailed technically by assumptions of facts and narrow constructions of laws.

It may be well to notice some of these grounds.

1. It is assumed that the Board in making the improvement exceeded the appropriation made for it; that in fact there was only one appropriation, or twenty thousand dollars really applicable to it.

But this is denied. And in reply it is said the Legislative Assembly first appropriated four millions for improvements, which included, in terms, *roads*. This was in July, 1871. It is true this was required to be expended in conformity with a plan of improvement, which contained an estimate of $25,000 for the Seventh-street road, but this was a *mere* estimate, and the law expressly declared it was to be followed *only so far as* "*practicable* and consistent "*with the public interests.*"

The Board was entrusted with the four millions of dollars, and its estimates were an indication of how it was proposed to expend it, but the Board was permitted in advancing the public interests to depart from the plan, or to lessen or increase the special estimates.

This is the plain import of the law.

The 2d section provided that in no case should the Board enter into any contract for work or improvements in excess of the estimates, less twenty per cent., but this must be construed in harmony with the 1st section, and only required the contracts to pursue the estimates with the required reduction, when the sum was found sufficient for a "special improvement."

But if the Board, in the exercise of a fair discretion and sound judgment, saw fit to exceed the estimate, it could do so, unrestricted by the limitation imposed when it strictly adhered to the estimate.

But it is not necessary to depend on this construction, for it is certain that an additional appropriation of $500,000 was made by the Legislative Assembly by the law of August 11, 1871, and this was, in terms, applicable to "roads," and sufficient, in connection with the estimate of $25,000, or without it, for the improvement of the Seventh-street road.

For the bill alleges the total cost of this improvement to have been $174,268.44; much less than the whole appropriation.

And this is the views of the law adopted by the Committee of the District of Columbia, H. R., 42d Congress, 2d session, Report No. 72, pp. I, III, IV.

"By the organic act establishing a government for the "District of Columbia, the Board of Public Works is made "an important department of the government. They are "to be appointed by the President and paid by the United "States. They are given the 'entire control of,' and are "to make 'all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, "and sewers of the city, and all other works which may "be intrusted to their charge by the Legislative Assembly "or Congress.' They are also 'to disburse all moneys "appropriated for the improvement of streets, avenues, "alleys, sewers, roads, and bridges.'

"The only limitation upon their powers in this behalf is "the provision of the organic act, 'that they shall have no "power to bind the District for the payment of any sum "of money, except in pursuance of appropriations made "by law, and not until such appropriations have been "made.'

* * * * * *

"On the 10th day of July, 1871, the Legislative Assembly passed what is called the first four-million act. It "authorized an issue of bonds to the amount of $4,000,000, "and their sale to raise money. In the same act the District legislature appropriated the whole sum of $4,000,000 'for the improvement and repairs of streets, avenues, "alleys, and roads in the District of Columbia, and for "the construction and repair of sewers, bridges, and other "public works therein, to be used and expended according "to the provisions of the organic act, *and as fully as may "be practicable and consistent with the public interests*, in "conformity with the plan of improvements submitted to "said legislature by the Board of Public Works of said "District, in its communication bearing date June 20, "1871.'

"On the 11th of August, 1871, the Legislative Assembly passed an act authorizing the Governor of the District to anticipate the revenue of the District to the "amount of $500,000, 'which sum shall be expended and "disbursed for the improvement and repair of the streets, "avenues, alleys, and roads in the District, and for the "construction and repairs of sewers, bridges, and other

" public works therein,' &c. This appropriation was sub-
" ject to no restriction or limitation whatever, except in the
" object and purpose for which the money was to be ex-
" pended. The second section of the four-million act con-
" tains a limitation, which, standing alone, would seem to
" be much more restrictive upon the power of the board
" than the language of the first section; but it cannot be
" supposed that the legislature intended to nullify or ab-
" rogate any part of the first section, or to make it inope-
" rative. The act must *be construed together*, and all its
" language have given to it force and effect, unless so re-
" pugnant that some part must be rejected. We think the
" qualifying words of the *first* section must be held to
" apply to and equally qualify the *second* section.

"The Board of Public Works did make contracts for
" some improvements not specified in the plan presented
" to the legislature, and for some of the improvements
" specified they expended *more* than the estimate for the
" work. Did they therein violate the law, and was this
" not in pursuance of any appropriation made? It is not
claimed but that the additional improvements made,
which were not specified, were in *entire harmony* with
" those which were specified, and were but *an extension*
" *and enlargement of the plan before the legislature.*
" The committee are satisfied that the legislature did not
" intend to limit the authority of the board in making im-
" provements to a *strict and literal* following of the exact
" plan presented. It had been somewhat hastily prepared,
" and it seemed to be understood that, to some extent, it
" was incomplete, and the legislature only intended that
" the plan should be the general guide as to the kind and
" character of the improvements to be made with the money
" appropriated, so that if this charge rested alone upon the
" appropriation made in the four-million act, it is difficult
" to see that it has been violated. But, if this were other-
" wise, the $500,000 appropriation for improvements was
" without any restriction whatever, and is sufficient to cover
" all expenditures made by the board for improvements
" that are not specified in the plan of improvements which
" had been laid before the legislature.

" It has been urged that, by this construction of the laws

" passed by the District legislature, a very great, if not " dangerous, latitude was given to the board, so that they " really were allowed to expend the money for improvements according to their own discretion. The appropri- " ations were very loosely made, and it does appear that " *the legislature intended to confer the power upon the* " *board to expend the money upon such improvements as* " *they deemed expedient.* Whether they judged wisely or " not, it cannot be said that the board violated the law in " making contracts and expenditures for improvements " which the legislature had left to their judgment and dis- " cretion."

1. This extract is clear and conclusive; and existed as an exposition of the powers of the Board of Public Works before the assessment against the appellee's property.

It was made May 13, 1872.

2. But it is next insisted that the assessment was improperly increased by an omission to assess church and and school property.

(1.)

At the utmost this is trivial and unimportant, and the maxim, *De minimus non curat lex*, would apply to it.

Broom's Legal Maxims, 106.

(2.)

But the omission was proper, because church and school property were exempt from assessment.

An Act exempting from taxes certain property in the District of Columbia, and to amend the "Act to provide for the creation of corporation in the District of Columbia by general law."

"*Be it enacted by the Senate and House of Representa-* " *tives of the United States of America in Congress as-*

" *sembled*, That from and after the passage of this act all
" churches and school-houses, and all buildings, grounds,
" and property appurtenant thereto, and used in connection
" therewith, in the District of Columbia, shall be exempt
" from any and all taxes or assessments, national, munici-
" pal, or county." Approved June 17, 1870.
Chap. 131, U. S. St.-at-Large, 16, p. 153.

The provisions of the 37th section of the act of February 21, 1871, authorizing assessments upon property adjoining benefited by improvements, was not a repeal of this act.

Repeals by implication are not favored.

"Specific and general laws will be made to stand together."

Black, C. J., in Brown *vs.* County Commissioners, says:

"When two statutes are so flatly repugnant that both cannot be executed, and we are obliged to choose between them, the later is always deemed a repeal of the earlier. This rule applies with equal force to a case of absolute and irreconcilable conflict between different sections or parts of the same statute. The last words stand, and others which cannot stand with them go to the ground. But whenever two acts can be made to stand together it is the duty of a judge to give both of them full effect. Even where they are seemingly repugnant they must, if possible, have such a construction that one may not be a repeal of the other, unless the last one contains negative words, or the intention to repeal is made manifest by some intelligible form of expression. That the law does not favor repeals by implication is a very old rule. Lord Coke says it has ever been confined to repealing as little as possible of preceding statutes. (11 Rep., 63.) The principle prevails even where the statutes are penal, and where the humanity of the law would plead for another construction. (6 Rep., 19.) With much stronger reason it applies to statutes which give powers to different persons. If the powers can subsist together, the grant of one is not a withdrawal of the other. (15 East., 377.)"
9 Harris Penn. Rep., 37.

In the case of Blain *vs.* Bailey, Treasurer, &c., Frazier, C. J., says:

"Again, the 42d section of the act of 1857 is a general
" statute without negative words, while the exemptory act
" of 1852 is a particular. In such a case the rule is, that
" there is no repeal by implication, unless it is absolutely
" necessary in order that the later act shall have any mean-
" ing at all. (Dwarris, 674; Sedgwick on Stat., 123;
" Williams *vs.* Pritchard, 4 T. R., 2.) The authority last
" cited was a case much like the one before us. An act
" of Parliament had authorized persons to enclose and em-
" bank portions of the soil under the river Thames, and
" had declared that such lands should be exempt from all
" taxes. Afterwards, the land-tax act, by general words,
" embraced all the land in the kingdom, and it was held
" that a tax upon the particular lands mentioned in the
" first act was illegal. Numerous other cases, both in
" English and American, cited in Sedgwick, are to the
" same effect."

25 Ind. Rep., 168.

In this case it was claimed by Michigan City that a right existed under a *general* tax law, passed in 1857, to tax property exempted under *a special* act of 1852.

And it is not to be presumed that one session of the same Congress intended to repeal by implication, and by a general act, the provisions of a special one. The Board of Public Works did not err therefore in the exemption of church or school property. To have charged the District or United States with more than two-thirds of the cost of an improvement made in connection with exempt property would have been improper. And whatever the small amount (if any) added to appellee's property was proper, the principle of dividing up this amount between all parties liable, in the authorized proportions, was wise and just.

The act of June 17, 1870, was passed at the second session of the Forty-First Congress, and the act of February 21, 1871, at the third session of the same Congress.

3. But it is maintained that the Legislative Assembly failed to exercise a discretionary power conferred on it by Congress, viz: to determine or fix a reasonable proportion, not in excess of one-third of the cost of improvements, and that, as a consequence, no assessment could be made against any property.

(1.)

Congress, however, conferred no such power on the Legislative Assemby. That it did is a pure assumption.

(2.)

The fact is, the Board of Public Works, either as the agents of the United States, or, more correctly, as the agents of the District of Columbia, (Barnes *vs.* D. C., 1 Otto, p. 540,) deriving its existence and powers from the United States, was not only given control of the streets, etc., but *expressly authorized*, *without the intervention or action of any other body*, to make assessments for improvements against individual and adjoining and benefited property to an amount not exceeding one-third of the entire cost.

The act of Congress is plain. It prescribes (1) the maximum amount which might be assessed — *i. e.*, an amount not over one-third of the whole cost—and (2) the rules or principle by which it may be ascertained.

And these are, *first*, that the property must be adjacent to an improvement; and *second*, it must be especially benefited by it.

These conditions existing, the Board of Public Works could make an assessment within the maximum proportion of one-third. *It alone was empowered to do so;* its exercise of judgment and discretion could not be transferred to any other persons, natural or artificial, nor be in any manner interfered with by the Legislative Assembly or controlled by it.

The Board of Public Works, therefore, acted correctly; and assessments made by it on its own views of improvements and estimates of cost are clearly correct.

But it is urged that the Board of Public Works in assessing the appellee's property proceeded arbitrarily, making the front feet the basis of its action without any other considerations.

1. That the Board could properly ascertain *the amount* which by a reference to the front feet should be assessed, if at the same time it considered the special benefits of the improvement to the appellee's property, ought not to be questioned. It was only one mode of ascertaining the amount, or a basis of calculation to determine the proportion of cost justly chargeable to the appellee. It did not necessarily exclude an inspection of the property—of the special benefits; it included them.

2. Moreover, that it did not do so is a mere allegation; *a denied allegation.*

3. Nor is it to be presumed that the Board would disregard its manifest duty, and make assessment arbitrarily and without regard to benefits conferred on property. On the contrary, the presumption would be that it correctly executed its power.

The Answers Conclusive.

4. Nor should it be overlooked that each essential allegation of the bill, whether of illegality or irregularity, is "denied under oath" by both defendants. And the denials being directly responsive to averments, unsustained by any proof or attempted proof, must be received as correct and conclusive.

Lenox *vs.* Prout, 3 Wh., 520.
Hughes *vs.* Blake, 6 " 453.
Union Bank of Georgetown *vs.* Gray, 5 Pet., 9.
Tobey Leonard, 2 Wall., 423.
Clark *vs.* Hackett, 1 Cliff., 269.

It is thus obvious that the Board of Public Works, as respects the Seventh-street improvement, acted regularly and legally.

Nor has the appellee established a single position advanced in his bill. Apart, therefore, from all questions of law, the assessment and certificate should be sustained.

(*h*.)

The Board of Public Works as a special Local Tribunal.

But if misconceptions of law existed on the part of the Board of Public Works, or if it acted improperly or irregularly, in view of its character and functions, would equity correct or attempt to prevent, the results of its errors or mistakes?

What was its true character?

It has been decided by this court, Barnes *vs.* District of Columbia, (1 Otto, 540,) that " it was a portion of the municipal government " of the District, and not an independent organization. But this decision does not relate to its functions or duties. In these respects it was a special and local tribunal, with prescribed and limited powers, and also capable of receiving from Congress or the District of Columbia additional authority or powers.

As respects the streets, avenues, etc., its powers were not only prescribed, but to a considerable extent *exclusive.* Nor were these powers simply ministerial. They involved, especially as regards " improvements and assessments," the exercise of *judgment as well as discretion.*

Can, then, equity properly interfere with its proceeding and determinations? Will it either revise, correct, or destroy?

A proper response will be first obtained by the citation of a few pertinent cases:

STATE CASES.

In Moores *vs.* Medley, Chancellor Kent says:

" It is perhaps not for me to say whether the supervisors " did or did not make a correct and legal determination. I " cannot find by any statute or precedent or practice that it " belongs to the jurisdiction of chancery, as a court of equity, " to review or control the determination of the supervisors " in their examination and allowance of accounts as charge- " able against their county or any of its towns, and in caus- " ing the moneys so allowed to be raised and levied. There " was no allegation of fraud or corruption in the case. The " most that could be said was, that they made an erroneous " determination.

" The act which has been cited (Laws N. Y., vol. 2, p. " 137) gave the supervisors authority to examine, settle, and " allow all accounts chargeable against the county, and to " ascertain each town's proportion, and to add such further " sum as any town should have voted to be raised for the " destruction of noxious animals, and to cause all such sums " to be raised and levied. This power implied and required " the exercise of some judgment, and to review and correc- " tion of all errors, mistakes, and abuses in the exercise of " the powers of subordinate public jurisdiction, and in the " official act of public officers, belongs to the Supreme Court. " In my opinion it belongs exclusively to that court. It " has always been a matter of equitable cognizance. This is " not the case of a private trust, but the official act of a " political body, and in the whole history of English court " of chancery there is no instance of the assertion of such " a jurisdiction as is now contended. The superintending " control in the cases has always been exercised in the court " of K. B., and nowhere else, and that court has proceeded " by *certiorari*, *mandamus*, *prohibition*, *information*, &c.

" I have only to regret that I cannot afford a remedy to " the party aggieved, but I am clearly of the opinion that I

" cannot uphold the injunction, and the motion must conse-
" quently be granted."

6 Johnson Chancery, p. 31.

In the matter of extension of Church street, it is said:

" A wide direretion has been conferred upon street com-
" missioners of New York city in respect to area of assess-
" ments to any land they deem benefited; and their discre-
" tion in this respect, being conferred by statute, is subject
" to no appellate tribunal."

49 Barb., 455.

" In the case of New York Life Insurance *vs.* Supervisor
" of the City of New York, it was alleged that the super-
" visors had exceeded and threatened to exceed the powers
" conferred on them by law. The question was distinctly
" raised whether the court would interfere with the super-
" visors as a special tribunal invested with power.
" The question was decided in the negative."

4 Duer, 198.

" In the case of Thatcher *vs.* Dusenberry, it is expressly
" decided a court of equity has no right to inquire into the
" proceedings of subordinate tribunals of special or local
" jurisdiction, such as commissioners of highway, with a
" view to set them aside if void at law, or to stay or restrain
" such proceedings."

9 How. Pr. R., p. 32.

UNITED STATES CASES.

It is expressly decided in Ewing *vs.* City of St. Louis,
that " with the proceedings and deliberations of inferior
" boards of tribunals of special jurisdiction courts of equity
" will not interfere, unless it should become necessary to
" prevent a multiplicity of suits or irreparable injury, or
" unless the proceeding sought to be annulled or corrected
" is valid upon its face, and the alleged invalidity consists
" in matters to be established by extrinsic evidence."

5 Wall., p. 413.

And in the late "State railroad tax cases" this Court, per Mr. Justice Miller, says:

"One of the reasons why a court should not thus interfere" (by injunction) "as it would in any transaction "between individuals is, that it has no power to apportion "the tax or to make a new assignment, or to direct another "to be made by the proper officers of the State. *These* "*officers, and the manner in which they shall exercise their* "*functions, are wholly beyond the power of the court* "*while so acting. The levy of taxes is not a judicial* "*function.*

"Its exercise by the constitution of all the States, and "by the theory of our English origin, is exclusively legislative."

Heine *vs.* The Levee Commissioners, (19 Wall., 660:)

"A court of equity is therefore hampered in the exercise "of its jurisdiction by the necessity of enjoining the tax "complained of in whole or in part, without any power of "doing complete justice, by making or causing to be made "a new assessment, on any principle it may decide to be "the right one. In this manner it may, by enjoining the "levy, enable the complainant to escape wholly the tax "for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper "manner."

This reasoning of the Court applies with great force to the present case. For it will be observed that the decree not only pronounces the assessment and certificate utterly void, and declares that they created no indebtedness whatever, but, going beyond this, prohibits any sale of the appellee's property, and requires the certificate to be delivered up and cancelled. It does not provide in any manner for a revision or correction of the assessment, or issuing of new certificate, but allows the appellee to be "freed from all responsibilities" on account of the improvement. And it thus involves the very evil clearly presented and considered by the Court—an inability—and hence a refusal or neglect, on the part of the court below—to make or cause to be made a new assessment, on any principle whatever.

Nor should it be overlooked that the Board of Public Works, while a part of the municipality denominated "The District of Columbia" existed as such under the direct authority of the United States, and primarily by virtue of Article I, Section 8, of the Constitution of the United States, conferring upon Congress the power "to exercise legislation" over the District of Columbia.

It was therefore not simply a "part of the municipality" of the District; not simply a special and local tribunal, but one of *a peculiar character;* one created by the Federal or National Government, with functions conferred by it; required to report its transactions for review, approval or disapproval, and to some extent ultimately responsible to it.

If, then, the acts of an ordinary local tribunal cannot be reviewed or disturbed by equity, how can the proceedings and determinations of so peculiar and special an organization or body as the Board of Public Works, be disturbed or enjoined?

Moreover, it appears that Congress *intended to reserve to itself* the power of review and correction, of approval or disapproval, of the transactions of the Board of Public Works; indeed, of all the acts of the District Legislature, or government. And hence it was provided in section 14 of the organic act of February 21, 1871, that "all acts of the "Legislative Assembly shall at all times be subject to re-

"peal or modification by the Congress of the United States;" and that nothing contained in the act should "be construed "to deprive Congress of the power of full and perfect legislation" over the District; and in the 37th section, that "on or before the first Monday of November in each year," reports of "transactions" of the Board for the preceding year should be submitted to "the Legislative Assembly," and to the Governor, "to be laid before the President of "the United States for transmission to the two houses of "Congress."

By the exercise of this "reserved power" *Congress itself* could correct all misconceptions, errors, or irregularities, without a resort to the courts; and especially to equity; and an injunction would be entirely unnecessary.*

Indeed, it is questionable whether, under the provision of the constitution relative to the District, it could part with this reserved power.

And it is certain that in creating the territory of the District of Columbia into a government by the act of Feb. 21, 1871, it expressly reserved its constitutional power, and conferred on the District Legislature only the power of inferior, or of qualified legislation.

But there is, perhaps, a stronger form of presenting this point. It may be thus stated:

1. When Congress reserves to itself the right to modify and repeal the legislation of a territorial or municipal Government created by it, or to control or correct its proceedings or transactions, is there not an *implied prohibition* against a court interfering by injunction; and must not any alleged evil be corrected exclusively by Congress

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* It would indeed amount to "an implied prohibition," and be in harmony with section 3224 of the Revised Statutes of the United States, which provide that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

under its "reserved power;" especially if it relates to questions of "internal policy," or taxes or assessments?

In the 78th number of *The Federalist*, this relevant passage occurs:

> "If it be said that the legislative body are themselves
> "the constitutional judges of their own powers, and that
> "the construction they put upon them is conclusive upon
> "the other departments, it may be answered that *this can-*
> "*not be the natural presumption, where it is not to be col-*
> "*lected from any particular provisions in the Constitu-*
> "*tion.*"

But if *it* is to be "collected from any particular provis-
"ion," it *is* "the natural presumption;" and in this case there is the explicit provision of the organic act by which Congress retains the right of "final judgment," of the laws of the Legislative Assembly of the District, as well as the provision of the Constitution.

2. No case, perhaps, exists in which this court has assumed the right to consider the validity of a law or ordinance, when Congress has in unequivocal terms *reserved to itself* the power of revision and correction.

Its action or judgment has been confined to enactments or ordinances made in positive terms, or under charters in which there was no reservation of power.

3. But authorities exist to the contrary. This court has repeatedly refused to consider the validity or constitutionality of territorial legislation, and the reasons of the refusal become important and pertinent in this case.

Miner's Bank *vs.* State of Iowa, 12 How., 1.
Scott *vs.* Jones, 5 How., 343.

In the first case, in direct reference to territorial legislation, it is said:

"It seems to us that the control of these territorial governments properly appertains to that branch of the government which creates and can change or modify them to meet its views of public policy—namely, the Congress of the United States. That control certainly has not been vested in this court, either in mode or in substance, by the 25th section of the Judiciary act."

* * * * * * * *

And afterwards it is said:

"Congress in creating the territorial Governments, and in conferring on them *powers of general legislation*, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations, equally as strong, they *reserved* the power of disapproving or annulling such acts of territorial legislation as might be deemed *detrimental*."

The second case is no less explicit.

And in New York it has been expressly decided, in the case of Thompson *vs.* The Commissioner of the Canal Fund, that State legislation will not be enjoined. Mitchell, J., says:

"The courts of the State are recognized in the Constitution, but the extent of their powers is prescribed by the legislature. *The legislature could withhold entirely the power to grant an injunction in any case, and abolish it*, or it can grant, with implied or express exceptions, that remedy. *The State cannot be sued in its own courts for any cause of action.* Can it be, then, that it was intended so far to violate this principle that its *officers*, when acting under a law passed by the legislature, should be enjoined from proceeding under such law, because it may be deemed to be unconstitutional, or for any other reason? An injunction, when allowable, may be granted by any judge. *It could not be the intention of the law that whenever any single judge of the supreme court, or any*

" *county judge, should deem a law unconstitutional, he*
" *should by injunction prevent the officers of the State from*
" *acting under it. And above all, such intention could*
" *not exist in relation to laws for raising revenue to pay*
" *for works already authorized by law.* If so, the collec-
" tion of taxes might be delayed, because the law under
" which the collector was proceeding had not been fully
" complied with, and loans equally essential to the support
" and the credit of the State might be suspended and sub-
" jected to usual delays of the law, thus stopping effectu-
" ally the wheels of government. The court of chancery
" refused to enjoin the collection of an illegal assessment,
" (Morris *vs.* Smedley, 5 John's Ch. R., 28,) and when the
" chancellor afterwards granted an injunction in such a case,
" (Meserole *vs.* Mayor of Brooklyn, 8 Paige, 198,) the court
" for the correction of errors reversed this decision. (26
" Wend., 132.) These authorities have been followed with
" like refusals to interfere in the court of common pleas
" and superior court and in the supreme court in this city.
" (See Wilson *vs.* Mayor of New York, 1 Abbott's Pr. R.,
" 4.")

These authorities and suggestions may be worthy the consideration of the court, and especially in view of the recent act of Congress of June 19, 1878. It appears to have been framed and passed in accordance with these views, now presented—is "in the nature of an appeal"—an ample "remedy for erroneous and excessive assess-"ments;" in fact, creates a special tribunal to consider, correct, and dispose of them.

It may impart force to this position to add, that if it be not correct, the act of June 19th will be of little practical value; and dissatisfied parties, when assessments may be revised, under the act of June 19th, 1878, may "resort to the "courts," and restrain the collection of the revised, as they have the original, assessments. And matters within the special province of Congress—"internal regulations"

—taxation and assessment, will be forced constantly on the time and attention of the courts.

In fine, the true remedy for erroneous and illegal taxation and assessments seems to be with Congress, and not in the courts.

Ratification by the District of Columbia and Congress.

(*i.*)

But *if* the improvement complained of was illegal, *if* the Board of Public Works proceeded originally without full authority, was it not competent for the Legislative Assembly and for the United States to sanction and ratify the improvement and the proceedings of the Board? And have not both fully done so?

(1.)

Of the power of the legislature, local or National, to pass retroactive and confirmatory laws there cannot well be any doubt. Cooley in his Constitutional Limitations says, (pp. 369–71:)

> "There are numerous cases which hold that retrospective
> " laws are not obnoxious to constitutional objection, while
> " in others they have been held to be void. The different
> " decisions have been based upon diversities in the facts
> " which make different principles applicable. There is no
> " doubt of the right of the legislature to pass statutes
> " which reach back to and change or modify the effect of
> " prior transactions, provided retrospective laws are not
> " forbidden *eo nomine* by the State constitution, and pro-
> " vided further that no other objection exists to them than
> " their retrospective character. Nevertheless, legislation of
> " this character is exceedingly liable to abuse; and it is a
> " sound rule of construction that a statute should have a

" prospective operation only, unless its terms show clearly " a legislative intention that it should operate retrospect- " ively. And some of the States have deemed it just and " wise to forbid such laws altogether by their constitutions.

" A retrospective statute curing defects in legal proceed- " ings where they are in their nature irregularities only, " and do not extend to matters of jurisdiction, is not void " on constitutional grounds unless expressly forbidden. " Of this class are the statutes to cure irregularities in the " assessment of property for taxation and the levy of taxes " thereon; irregularities in the organization or elections of " corporations; irregularities in the votes or other action " by municipal corporations, or the like, where a statutory " power has failed of due and regular execution through " the carelessness of officers, or other cause; irregular " proceedings in courts, &c.

" The rule applicable to cases of this description is sub- " stantially the following: If the thing wanting, or which " failed to be done, and which constitutes the defect in the " proceedings, is something the necessity for which the " legislature might have dispensed with by prior statute, " then it is not beyond the power of the legislature to dis- " pense with it by subsequent statute. And if the irregu- " larity consists in doing some act, or in the mode or man- " ner of doing some act which the legislature might have " made immaterial by prior law, it is equally competent to " make the same immaterial by a subsequent law."

(2.)

This court has repeatedly rendered decisions in harmony with this rule:

" Municipal corporations are created by the authority of " the legislature, and Chancellor Kent says they are in- " vested with subordinate legislative powers, to be exer- " cised for local purposes connected with the public good, " and such powers are subject to the control of the legis- " lature of the State." (2 Kent's Com., p. 275.)

* * * * * * * * *

"*Mistakes and irregularities* in the proceedings of "municipal corporations are of frequent occurrence, and "the State legislatures have *often* had occasion to pass "laws to obviate such difficulties. Such laws, when they "do not impair any contract, or injuriously affect the "rights of third persons, are generally regarded as unobjectionable, and *certainly* are within the competency of "the legislative authority. Unlike what is sometimes exhibited in laws of this description, the legislature did not "attempt to ratify the subscription, but left the matter entirely optional with the common council, as the representatives of the city, to accept or reject the proffered "remedy. They elected to ratify and affirm the subscription; and by so doing gave the same effect to the contract to subscribe for the stock, and to all the proceedings that led to it, as if the authority to make it had "been coeval with the presentation of the petition on "which those proceedings were founded. No injustice "will result from this conclusion, as it is obvious that the "contract had been made in good faith, under the full belief that they were duly authorized to subscribe for the "stock and issue the bonds in the name of the city, so that "the only operation of the *confirmatory* resolution was to "give the very effect to the proceedings which they had intended, but which, from the *defect* in their authority, had "not been accomplished. (Watson *vs.* Mercer, 8 Pet., p. 111; Wilkinson *vs.* Leland *et al.*, 2 Pet., p. 661.)

Bissell *vs.* City of Jeffersonville, 24 Howard, 294, 295.

"Judge Story said there was no maxim, where it does not "prejudice the rights of strangers, better settled in reason "and law than *Omnis ratihabitio retrotrahitur et mandato* "*priori æquiparatur*, and it is equally well settled that "the maxim is as applicable to corporations in matters of "simple contract as to other contracting parties. Questions of ratification most frequently arise in respect to "the acts or omissions of agents, but the general rule is "the same in all cases where the act done was one which "it was competent for the party attempted to be charged "to do. When the principal, upon a full knowledge of all

" the circumstances of the case, deliberately ratifies the
" acts, doings, or omissions of his agent, he will be bound
" thereby as fully, to all intents and purposes, as if he
" had originally given him direct authority in the premises,
" to the extent which such acts, doings, or omissions reach.

" Ratification is inoperative if the party attempted to be
" charged was not competent to make the contract in ques-
" tion when the same was made, nor when the supposed
" acts of ratification were performed, or if the contract was
" illegal, immoral, or against public policy. Like an indi-
" vidual, a *corporation* may ratify the acts of its agents
" *done in excess* of authority, and such ratification may, in
" many cases, be *inferred* from acquiescence in those acts,
" as well as from express adoption. Such ratification may
" be by *express* consent, or by acts and conduct of the prin-
" cipal inconsistent with any other hypothesis than that he
" approved, and intended to adopt what had been done in
" his name; and it was held in *Peterson* v. *The Mayor of*
" *New York*, that the principle is as applicable to corpor-
" ations as to individuals. Where the officers of the cor-
" poration openly exercise powers affecting the interests of
" third persons, which presupposes a delegated authority
" for the purpose, and other corporate acts subsequently
" performed show that the corporation must have contem-
" plated the legal existence of such authority, the acts of
" such officers will be deemed rightful, and the delegated
" authority will be presumed."

Supervisors *vs.* Schenck, pp. 781, 782.

" II. *The city of Beloit* was chartered by the legisla-
" ture of Wisconsin in 1856. It embraces a part of the
" territory which previously belonged to the *town of Be-*
" *loit.* In the seventeenth section of the charter it is en-
" acted that 'all principal and interest upon all bonds
" 'which have heretofore been issued by the *town of Be-*
" '*loit for railroad stock or other purposes*, when the
" 'same or any portion thereof shall fall due, shall be paid
" 'by *the city and town of Beloit* in the same proportions
" 'as if said *town and city* were not dissolved,' &c.

" This provision was re-enacted in 1857 in an act amend-

" ing the charter of the city. No bonds were issued in pay-
" ment for railroad stock but those to a part of which this
" controversy relates. The language used by the legisla-
" ture is clear and explicit. No gloss can raise a doubt as
" to its meaning. It distinctly affirms, and the affirmation
" is repeated, that the bonds shall be paid.

" The only point to be considered is the effect of this
" provision. That is not an open question in this court.
" Whenever it has been presented, the ruling has been
" that, in cases of bonds issued by municipal corporations,
" under a statute upon the subject, ratification by the leg-
" islature is in all respects equivalent to original authority,
" and cures all defects of power, if such defects existed,
" and all irregularities in its execution. The same princi-
" ple has been applied in the courts of the States. This
" court has repeatedly recognized the validity of private
" and curative statutes, and given them full effect, where
" the interests of private individuals were alone concerned,
" and were largely involved and affected. The earlier and
" more important of these authorities are so well known to
" the profession and are so often referred to, that it would
" be waste of time to comment upon them. We hold this
" objection also fatal to the appellant's case."

Beloit *vs.* Morgan, 7 Wallace, pp. 623–4.
Gepeke *vs.* City of Dubuque, 1 W., 220.
Clinton *vs.* Englebrecht, 13 W., 446.

These cases decide, that either *directly* or by *implication*, void, excessive, or irregular acts of an inferior, or officer or agent, of a corporation, may be adopted, confirmed, or ratified by the superior or legislative body. Or, in other terms, that ratification by a principal of the acts of an agent, of either a natural or artificial person, is ordinarily equivalent to original power.

(2.)

These principles are relevant to this case.

The Board of Public Works was appointed on the nomination of the President of the United States and confirmation of its Senate.

16 St. at L., p. 419.

And this court in Barnes *vs.* The District, (1 Otto, 540,) decided that it was a subordinate part of the District government, "an ordinary agent," &c., of that municipality.

(3.)

The *general* power of legislation conferred on the District government was in these words:

> " Sec. 18. *And be it further enacted*, That the legislative power of the District shall extend to *all* rightful " subjects of legislation within said District, consistent " with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth " section of the first article of the Constitution of the United " States; but all acts of the legislative assembly shall at " all times be subject to *repeal or modification* by the Congress of the United States, and nothing herein shall be " construed to deprive Congress of the *power* of legislation " over said District in as ample manner as if this law had " not been enacted."

16 St. at L., p. 426.

Besides this general power it had *special* legislative power.

In the 37th section of the act of February 21, 1871, it was provided:

> " The Board of Public Works shall have entire control " of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, " and sewers of the city, and all other works which may be " intrusted to their charge by the legislative assembly or " Congress."

Hence, if any acts were done beyond its power or authority, by the Board of Public Works, they could be approved, confirmed, or ratified by the Legislative Assembly of the District.

And what could be done by the Legislative Assembly, and even more, could be done by the Congress of the United States.

Art. 8, clause XVII, of the Constitution of the United States, reads, so far as relates to the District of Columbia, thus:

> "To exercise exclusive legislation in all cases whatso-
> "ever over such district (not exceeding ten miles square)
> "as may by cession of particular States and the acceptance
> "of Congress become the seat of government of the United
> "States."

And Section 18 of the act of February 21, 1871, (*ante*, p. —,) was in accordance with this clause.

It conferred the powers of legislation on the District, only so far as "consistent with the Constitution," and rendered its acts "at all times" "subject to repeal or modification "by" Congress, and provided that the legislative powers of the District should not in any manner interfere with that of Congress.

Possessing these powers, both the Legislative Assembly and Congress have approved, confirmed, and ratified the acts of the Board of Public Works, in making improvements and assessments for them.

(4.)

Legislative Assembly.

The Legislative Assembly first appropriated four millions of dollars for the improvement and repairs of streets, avenues, alleys, and ROADS, in the District. This act included some restrictions, not applicable, perhaps, to the present case.

Act of July 10, 1871.

(5.)

Then, in the *second* place, the Legislative Assembly made an *unconditional* appropriation of five hundred thousand dollars. This, as the former act, in terms included "ROADS." It is true that this was made in anticipation of the revenue; still, it was a distinctive appropriation.

Act of August 11, 1871.

(6.)

Next appears the act for reimbursing the District the $500,000 anticipated. The reimbursement is required to be made out of the four million appropriated on the 10th of July, 1871; but this is immaterial. And this act expressly declares that the five hundred thousand dollars HAD BEEN "USED" by the Board of Public Works for improvements, as contemplated in the act of August 11, 1871; and the improvement of "ROADS" is directly mentioned in the act.

(7.)

The "damage act" provided for the assessment of damages occasioned by improvements made by the Board of Public Works, without any condemnation of any improvement.

It thus indirectly approved all the improvements.

Act of June 20, 1872.

(8.)

Next, the time of payment for improvements made by the Board of Public Works was extended to five years, and the certificates which had been issued made payable in five equal annual instalments. And then it was provided that certificates "outstanding" should, at the request of holders and on assignments, be purchased by the Commissioners of the Sinking Fund. In making these provisions, both "*work done and in progress*," and the certificates issued for completing improvements, were recognized. Thus, the ratification was direct and complete. The bill charges (Record, p. 2, paragraph 3) that notice was given on the 8th day of April, 1873, that unless the assessment was paid in 30 days a certificate would issue, and this 30 days expired on the 8th day of May, 1873, before the passage of this act. At the date of the *approval of the act* this certificate was issued and embraced in this legislation.

Act of May 29, 1873.

(9.)

Two-thirds of the cost of the improvement of the Seventh-street road was paid by the District, viz., $93,836.84.

(10.)

It thus appears that "all along," and in the most direct form, *the Legislative Assembly* sanctioned the improvements made by the Board of Public Works, including "the Seventh-street road," and the assessments made and certificates issued.

Congress.

1.

The acts of the Legislative Assembly were subject to repeal and modification by Congress. It was subordinate and conditional legislation. And the acts of the Board of Public Works were required to be transmitted to Congress;—in fact were.

Act of February 21, 1871, 16 St. at Large, p. 419.

2.

The effect of this "reserved power" has been declared by this court:

> "In the first place we observe that the law has received
> "the *implied* sanction of Congress. It was adopted in
> "1859. It has been upon the statute books for more than
> "twelve years. It must have been transmitted to Congress
> "soon after it was enacted, for it was the duty of the sec-
> "retary of the Territory to transmit to that body copies of
> "all laws on or before the 1st of the next December in
> "each year. The simple disapproval by Congress, at any
> "time, would have annulled it. It is no unreasonable in-
> "ference, therefore, that it was approved by that body."

Clinton *vs.* Englebrecht, 13 Wallace S. C. R., 446.

3.

And this citation is in all respects pertinent to the present case, for none of the relevant acts of the Legislative Assembly were repealed or modified, and none of the transactions of the Board of Public Works disapproved by any legislation. Transmitted to Congress as required, they must be regarded as tacitly approved.

4.

But the approval is more than tacit. It is *positive and direct.*

(1.)

In the law modifying the government of the District, (June 20, 1874,) the first section expressly authorized the commissioners to make contracts "for the protection and "preservation of improvements EXISTING or commenced." The Seventh-street road improvement was an "*existing*" one.

(2.)

The second section authorized an examination and settlement by the Board of Audit of the claims created by the Board of Public Works, and of all contracts made by it, "oral or written," and claims for damages arising out of improvements made by the Board.

The eighth section disapproves and annuls section four of the act of the Legislative Assembly of May 29, 1873, thus approving the other sections of that act as given *ante*.

It then prohibits any advertisements or sales under "the "sewerage act" of the Legislative Assembly of June 26, 1873, and the issuing of any additional certificates under that act.

Perhaps the eighth section may be regarded as a *disapproval* by Congress of the sewerage act. If so, then in all other respects, as regards the acts of the Board of Public Works, improvements made by it, contracts, "*oral and written*," and other matters, there is full approval.

18 Stat. at Large, Part 3, p. 116.

(3.)

Nor is this all; the "*assessment* act" of the Legislative Assembly of 10th August, 1871, Congress also approved.

This was done by amending it, so as to provide that sales of property on certificates of improvement should be advertised twice a week for three weeks, instead of daily.

There is here an approval not only of improvements, but of assessments and certificates, and, besides, of the mode in which the assessments were made and certificates issued. And this approval extends to this case.

Act of Legislative Assembly of August 10, 1871.

Act of Congress, March 3, 1875, 18 Stat. at Large, Part 3, p. 505.

(4.)

Finally. The last Congress passed the following:

" CHAP. 309.—An act to provide for the revision and correction of assess-
" ments for special improvements in the District of Columbia, and for
" other purposes.

"*Be it enacted by the Senate and House of Representa-*
" *tives of the United States of America in Congress as-*
" *sembled*, That the Commissioners of the District of Co-
" lumbia be, and they are hereby, directed to *enforce* the
" collection, according *to existing laws*, of all assessments
" for special improvements *prepared under an act of the*
" *legislative assembly of August tenth, eighteen hundred*
" *and seventy-one*, as charges upon the property benefitted
" by the improvements in respect to which said assessments
" were made: *Provided*, That upon complaint being made
" to the Commissioners, within thirty days from the pas-
" sage of this act, of erroneous or excessive charges in re-
" spect to any of said assessments which remain *unpaid*,
" said Commissioners are hereby authorized to revise *such*
" assessments so complained of, and to *correct* the same;
" and where certificates of assessment *have been* issued,
" they shall *issue* to *the holder* of such certificate a draw-
" back certificate for the amount of such erroneous or ex-
" cessive charges, which certificates shall be received at any
" time in payment of assessments for special improvements,
" and they shall be redeemed in the manner prescribed for
" the redemption and purchase of certificates, as provided

"by an act of the legislative assembly of May twenty-ninth, "eighteen hundred and seventy-three, entitled 'An act "'for extending the time of payment of special assess- "'ments, and for other purposes,' after the provisions for "the purchase and redemption of certificates named in said "act shall have been fully carried out.

"Approved June 19, 1878."

Chapter 309, 45th Congress.

Here, even more fully than in previous acts, the ratification—approval—is direct and positive.

1. It directs the enforcement of the payment "of *all assessments for special improvements*" *prepared under the act of the Legislative Assembly of August* 10, 1871.

2. It thus approves of that act, and sanctions the mode of assessment embraced in it.

3. It regards these assessments as involving ***benefits*** to the property assessed.

4. Regarding the assessments as correct in principle and mode of ascertainment or determination, it provides for the correction of possible unpaid erroneous *or* excessive charges.

5. The mode provided is that of complaint to the Commissioners, correction by them of the errors of amount or excess, and the issuing of drawback certificates to the *holders* of the old certificates.

6. The old certificates are allowed to remain, however, a just charge and lien on the assessed property less the amount of the drawback certificates; and unless paid sale may be made of the assessed property on the original certificates. They are not required to be withdrawn or cancelled, but may be reduced in amount.

Could approval—ratification of the mode and principles of assessments be more direct and complete? Certainly not.

(4.)

Other references to ratification by both the Legislative Assembly and Congress might be given, but it is surely unnecessary.

(5.)

The facts of Congressional appropriations, that the improvement of "Seventh street" was reported to Congress, with a statement of the cost, and that both the Legislative Assembly and Congress have paid their proportions of the cost, should, however, be considered. It is ratification by legislation as well as by acts.

Certainly such repeated and continuous ratification should be conclusive. Nothing else should be required.

(*j*.)

The First National Bank of New York a bona fide purchaser.

But if the Board of Public Works acted in any particular illegally, would its misconduct or misconception affect the First National Bank of New York as the *bona fide* holder of the unpaid certificate issued against the appellee's property?

1.

It is to be observed, that the District of Columbia, does not dispute the right of the Bank to hold and enforce the collection of the certificate. It received a fair and just consideration for the certificate, and the District enjoyed the advantage of the consideration. *It* admits the justness and validity of the "claim" of the Bank.

2.

It is only disputed by the appellee. Neglecting or declining to pay for the improvement made in connection with his property, the Bank furnished the money to enable the District—or Board of Public Works—to "meet its ob-"ligations." And the appellee maintains that the certificate—*admitted to be transferable* — "*in its character* "*transferable*"—(Record, p. 5) and shown to be held by the Bank for valuable consideration, and without any notice of objections or asserted illegalities—should be "delivered up and cancelled."

3.

It is certainly difficult to conceive on what ground of equity or fair dealing, in view of all the facts, this position can be even plausibly supported.

4.

The ordinary rule applicable to this class of paper is well stated in "1 Dillon on Municipal Corporations," p. 493, § 405:

"Bonds issued by municipal corporations on time, nego-"tiable in form, and for sale in the market, under express "authority from the legislature, are negotiable, with all "the qualities and incidents of negotiability. Such securi-"ties are made to raise money by their sale, and this object "would be defeated if they were subject to the equities "(when the power to issue exists) in the hands of a *bona* "*fide* purchaser."

So numerous and familiar are the cases in reference to this doctrine that a mere reference to a few of them will be sufficient.

Mercer County *vs.* Hackett, 1 Wall., 83.

Meyer *vs.* Muscatine, 1 Wall., 384.
Moran *vs.* Miami County, 2 Black, 733.
Cromwell *vs.* The County of Sac.
State of Iowa, (U. S. S. C., Oct. T., 1877.)

5.

It is true that the certificate in this case is not exactly similar to the municipal and county bonds and orders which have elicited the various decisions of this Court; *but it is essentially the same.*

It was issued, whether correctly or incorrectly, under sanction of law, for a public improvement; it was a "paper of indebtedness;" it was "in its nature transferable"—and was actually transferred; it was for $2,742.04, with interest. It was due one year from its date, and after that date "collectible," at the request of the "holder," by sale of the property against which it was issued.

It is therefore within the spirit—the principle—if not the letter of the cases cited; and if so, the First National Bank of New York must be regarded as a *bona fide* purchaser and holder of the certificate issued against the appellee's property, and equity will not disturb its possession or interfere with its associated privileges and rights. Of its absolute integrity in the purchase and possession of the certificate there is no dispute; and it deserves the protection rather than the antagonism of equity.

WILLIAM A. COOK,
WALTER S. COX,
Solicitors for Appellee, First National Bank of New York.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 239.

THE FIRST NATIONAL BANK OF NEW YORK *et al.*,
APPELLANTS,

vs.

ABNER C. P. SHOEMAKER,
APPELLEE.

Rehearing on Appeal from the Supreme Court of the District of Columbia.

BRIEF OF COUNSEL FOR APPELLEE.

T. A. LAMBERT,
R. T. MERRICK,
Of Counsel for Appellee.

Judd & Detweiler, Printers.

Supreme Court of the United States.

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BRIEF OF COUNSEL FOR APPELLEE.

STATEMENT OF FACTS AND PRINCIPLES.

The appellee owns and resides upon a farm fronting 2,819.7 feet upon the east side and near the northern terminus of the Seventh street road, a highway extending for a distance of five miles from the street that bounds the city of Washington to the northern boundary line of the District of Columbia. This road is bordered by farm lands, and, before the 21st of February, 1871, was, in common with other public roads and bridges in Washington, under the care and *exclusive* jurisdiction of the levy court, one of the three municipal organizations originally established for the government of the District of Columbia.

See act June 25, 1864, 13 St. at L., p. 193.

To the levy court and its associate corporations—the cities of Washington and Georgetown—succeeded, by act of Congress, approved February 21st, 1871,* one municipality with powers co-extensive with the territorial limits of the District of Columbia.†

The erection of the latter into one municipal government and the consequent merger of the three pre-existing entities was not attended, however, with a corresponding obliteration of the lines, distinguishing, one from the other, the cities of Washington and Georgetown, or dividing both from that part of the District lying without the limits of either, which had always been designated as the county of Washington.‡

Nor was the change accompanied by the transfer to any one set of municipal agents of control of the public works as well of the county as of the two cities. On the contrary, as, under the pre-existing system the power to repair streets, avenues, alleys, and sewers, belonged to certain officials styled superintendents of streets and ward commissioners, and as to the levy court was committed "the care and charge of and exclusive jurisdiction over all the public roads and bridges in the county;" so, under the new administration, the entire control of and power to make regulations for keeping in repair the streets, avenues, alleys, and sewers of the city, devolved upon certain municipal and fiscal agents, denominated the Board of Public Works,§ while to the Legislative Assembly was committed the care and charge of and exclusive jurisdiction over all the public roads and bridges except such as belonged to and were under the care of the United States.‖ It is important to observe this clearly defined discrimination between the powers exerciseable by the several agencies of the new municipality, relatively to its territorial divisions, in view of the claim persistently advanced by the appellants to the exercise of control and jurisdiction by the Board of Public Works as well over the roads and bridges in the county, as over the streets, avenues, and sewers of the cities. Their object in making this claim is apparent. It is no other than to avoid the jurisdiction of equity. For, if the law does not warrant them in holding that the Board of Public Works was clothed with discretionary *and judicial* functions in the improvement of the Seventh street road; but, on the contrary, stamps its action, in this regard, as purely ministerial, then must the labored arguments of the opposing counsel to prove that the appellee's remedy lay in the common-law courts, of necessity, fall to the ground. For this position, however, they are able to discover no other warrant than that supposed to be furnished by the clause conferring on the Board of Public Works "entire control of * * the streets, avenues, alleys, and sewers of the city, *and all other works which may be* INTRUSTED *to their charge by the Legislative Assembly or Congress.**

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* 16 St. at Large, p. 419.

† Rev. St. Dist. of Col., Sec. 2.

‡ Rev. St. Dist. of Col., Sec. 94.

§ Rev. St. Dist. of Col., Sec. 77.

‖ Id., Secs. 67, 247.

But, if, as we have seen, the exclusive control over public roads and bridges was committed by Congress to the Legislative Assembly, then on the principle that *delegata protestas non protest delegari* it would have been incompetent for that body to have devolved upon the Board of Public Works or any other agent, the whole or any part of that jurisdiction. In other words, the discretionary and judicial duty of determining the expediency, choosing the means, and prescribing the order of time in which the improvement of roads and bridges should be made, rested exclusively with the Legislative Assembly. That duty having been discharged, however, the ministerial conduct of the work might well have been *intrusted* to the Board of

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* Rev. St. Dist. of Col., Sec. 77.

Public Works or to any natural agent. Nor would the fact (if fact it was) that the Board of Public Works exercised judicial functions in respect of the subjects if its urban jurisdiction have disqualified it from acting as a ministerial agent of the Assembly in the conduct of a road or suburban improvement.

"An ordinance of a city corporation, directing the construction of a work within the general scope of its powers, is a judicial act; *but the prosecution of the work is ministerial.*"
Kavanagh *vs.* Brooklyn, 38 Barb., 232.

Whatever, therefore, was the nature of the functions exercised by the Board of Public Works, respecting the subjects of its exclusive control (*i. e.*, the streets, avenues, alleys and sewers of the city,) there can be no pretense that as to all works (*e. g.*, improvements of roads and bridges) legally intrusted to its charge by the Legislative Assembly, or by Congress, it performed other duties than those of a ministerial agent, or that its acts were other than purely ministerial acts, reviewable and redressible, when violative of trust, by a court of equity only.

The limitations upon the powers exerciseable by the Board of Public Works within its appropriate sphere of jurisdiction, *i. e.*, the cities of Washington and Georgetown, are defined with precision in the organic act. Among those of most value to the tax payers were the following:

"All contracts made by the Board of Public Works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District."
Rev. St. D. C., Sec. 80.

"The Board of Public Works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."
Id., Sec. 81.

"The Board of Public Works shall assess, IN SUCH MANNER AS SHALL BE PRESCRIBED BY LAW, upon the property adjoining and to be specially benefited by the improvements AUTHORIZED BY LAW and made by them, a reasonable proportion of the costs of the improvement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected."

Id., Sec. 151.

These clauses may be well supplemented by reference to certain limitations upon the Legislative power:

"The Legislative Assembly shall never authorize the payment of any claim, or part thereof, created against the District under any contract or agreement made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Id., Sec. 52.

"No money shall be drawn from the Treasury of the District, except in pursuance of an appropriation made by law."

Id., Sec. 112.

On the 20th of June, 1871, in obedience to a resolution of the Legislative Assembly, the Board of Public Works submitted to that body, in the form of a comprehensive plan, a statement of the improvements which it recommended and the estimated cost thereof, together with the draft of a bill providing the necessary means for the execution of the work. In order to conciliate those members of the Assembly, who might regard with dismay the very considerable aggregate of these estimates, the board deemed it advisable to accompany the transmission of its plan with the explanatory communication embodied in Exhibit "C," at pp. 8–10 of the printed record.

It will be observed that it is therein given as the deliberate opinion of the board that, the sum of $4,358,598—the aggregate aforesaid—would be sufficient to complete the improvements detailed in the plan. Stress is likewise laid upon the board's proposal to pay cash for all work that might be done under its direction, and the consequent saving of twenty per cent. on the cost of corresponding work done under the preceding corporation of Washington. A most instructive feature of this communication, in that it establishes the board's own construction of the limitation upon its power to contract, is to be found in its strictures upon over-measurements in computing the amount of work done under the previous municipality. "This," it says, "will be prevented by the establishment in advance of the exact quantities of each kind of work to be executed; and thus, when a contract is entered into the entire amount to be paid, can be specifically determined. No increase can therefore, be allowed, as by the terms of the organic act, even the Legislative Assembly is prohibited, after a contract has been made, from granting or authorizing 'extra allowance' or 'compensation' to the contractor."

Record, p. 10.

Among other improvements embraced in the comprehensive plan was that of the Seventh street road, throughout its whole extent, at an estimated cost of $25,000, misprinted $2,500.

Record, p. 11.

An act of the Legislative Assembly, approved on the 10th of July following, entitled "An act making appropriations for improvements and repairs, and providing for the payment thereof," appropriated the sum of "four millions of dollars" for the improvement and repairs of the streets, avenues, alleys, and roads in the District of Columbia, and for the construction and repairs of sewers, bridges, and other public works therein, to be used and expended according to the provisions of the act of Congress of the United States, entitled "An act to provide a government for the District of Columbia," approved February 21, 1871, and as fully as may be practicable and consistent with the public interest in conformity with the plan of improvement submitted to said Legislature by the Board of Public Works of said District in its communication bearing date June 20, 1871.

By the second section of that act it is further provided:

" That *in no case* shall the said board enter into a contract for any work the cost of which shall exceed the amount estimated for in its aforesaid plan, *less twenty per centum* of said estimates."

It is apparent from the sections of the act above quoted—

I. That the plan of improvement submitted by the Board of Public Works was incorporated therein, and—

II. That from the sum of $25,000, appropriated for the repair of the Seventh street road, twenty per centum was required to be deducted, *thereby reducing the amount applicable to that purpose to* $20,000.

The following exact historical review of subsequent legislation fails to disclose any other or further appropriation for this specific improvement:

The operation of the act of July 10th, 1871, just cited, having been stayed by legal process at the suit of tax-payers, the Legislative Assembly found it necessary to provide for the payment of expenses incurred in the inauguration and completion of necessary repairs and improvements, and sought temporary relief by the passage of an act entitled "An act making appropriation for improvements and repairs in the District of Columbia, and anticipating the revenue for the purpose of providing for the payment thereof."

The Governor was thereby authorized to anticipate the revenue of the District which might arise from the assessment and collection of taxes during the current year, to the amount of five hundred thousand dollars, which sum should be expended and disbursed for the improvement and repairs of the streets, avenues, alleys, and roads in the said District, and for the construction and repairs of sewers, bridges, and other public works therein, according to the provisions of the 37th section of an act of the Congress of the United States entitled "An act to provide a government for the District of Columbia," approved February 21, 1871.

This act, which was approved August 11, 1871, was clearly a measure of temporary expediency, necessitated on the one hand by judicial restraint upon the issuance of the bonds provided for in the act of July 10th, already mentioned, and, on the other, by the indebtedness arising from the completion of necessary repairs, and incurred by the inauguration of the improvements embraced in the comprehensive plan before mentioned.

Its design was, clearly, to create a general fund out of which should be defrayed the cost of so much and such part of the special improvements, *provided for in the plan*, as were then completed or in progress, *and for which contracts had been made on the basis of the estimates furnished by said plan.*

That such is the true origin and scope of the act in question, is shown by reference to a subsequent act of the Legislative Asssembly, which reads as follows:

An Act to reimburse the general fund of the District for moneys drawn therefrom for improvements.

Whereas by an act of the Legislative Assembly of the District of Columbia, entitled "An act making appropriations for improvements and repairs in the District of Columbia, and anticipating the revenue for the purpose of providing for the payment thereof," approved August eleven, eighteen hundred and seventy-one, the Governor was authorized to anticipate the revenue of the District which might arise from the assessments and collection of taxes to the amount of five hundred thousand dollars, which was accordingly done, and said sum appropriated and used by the Board of Public Works for improvements as contemplated in said act; and whereas this was a temporary measure looking to the ultimate issuing of bonds for improvements, and the use of proceeds thereof for that purpose; and whereas it is not proper that the general fund of the District should be allowed to be permanently diminished by the antipation of its revenue authorized by said act: therefore,

Be it enacted by the Legislative Assembly of the District of Columbia, That the Governor is hereby empowered and directed to re-imburse the District of Columbia, or to cause to be re-imbursed to it, out of the proceeds of the four million loan, authorized to be made for improvements in said District, the sum of five hundred thousand dollars, anticipated for improvements agreeably to said act of August eleven, eighteen hundred and seventy-one; and that said sum, when obtained, shall constitute a part of the general fund of said District, and thereafter be held and used as other funds thereof, for its exclusive benefit.

Approved January 19, 1872.

The next instance of the exercise, by the Legislature, of its power to make appropriation for special improvements is furnished by the act of August 19, 1871, entitled "An act authorizing the District of Columbia to create a debt for special improvements and repairs in the District of Columbia, by the issuing of four millions of bonds, and levying a tax for the payment of the interest as it shall annually accrue thereon, and submitting the act with the question of the issuing of four millions of improvement bonds, to a vote of the people at a general election in said District."

This enactment was, however, declared void by Congress, *and the act of July* 10, *before referred to, was, by the same authority, approved* May 8, 1872.*

The only legislative appropriation for special improvements remaining to be noticed is a provision for the payment, out of the general fund, of the District proportion of assessments for improvements made subsequent to February 21, 1871, as set forth in the 2d section of an act entitled "An act regulating assessments for improvements," approved December 19, 1871. As the sole apparent purpose of this enactment was to effect the levying of assessments in accordance with the 37th section of the organic act, and the payment, out of the general fund, of such part thereof as was chargeable against the District government, it must be regarded as determining the application of existing appropriations, not of providing new ones.

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* Rev. St. Dist. of Col., Secs. 126–127.

Such is a brief recapitulation of the legislation by the late municipal government in respect of special improvements. *Enough has been exhibited, in this sketch, to show that the only appropriation made for the improvement of the Seventh-street road was the sum of* $25,000, *of which twenty-five per centum, by the act of July* 10, 1871, *was required to be deducted, thus limiting the cost of said improvement to the sum of* $20,000.

It is eminently worthy of remark that the sole exercise by the Legislative Assembly of its delegated power over assessments is exhibited in the following enactment, which, while it prescribes the process for collecting, *fails, wholly, to establish the fundamental rule* FOR APPORTIONING *the cost of special improvements:*

Be it enacted by the Legislative Assembly of the District of Columbia, That whenever any of the improvements mentioned or referred to in section thirty-seven of the act entitled "An act to provide a Government for the District of Columbia," approved the twenty-first day of February, one thousand eight hundred and seventy-one, shall be completed, a statement of the cost thereof shall be prepared by the Board of Public Works, and filed in the office thereof; and immediately thereafter an assessment, based upon said statement, shall be made as provided for in said section of said act, which assessment shall be collected by the said board in the same manner as other taxes of the District of Columbia are now or may hereafter be authorized to be collected.

SEC. 2. *And be it further enacted*, That within ten days after making an assessment, the Board of Public Works shall give, or cause to be given, written or printed notice to each proprietor of property adjoining and specially benefited by any improvement of the amount assessed against the same, if he be a resident of the District of Columbia, and if he be a non-resident, to his tenant or agent, requiring the amount to be paid within thirty days from the date of such notice, and a return of such service shall be made to the said board, with proof of the manner in which the same shall have been served, and be filed among its records; and the service of such notice shall, in all cases, be either personal on said proprietor, agent, or tenant, or by pasting or placing a copy thereof on the property, as aforesaid, against which the assessment exists.

SEC. 3. *And be it further enacted*, That if any person or persons, notified as aforesaid, shall neglect or refuse to pay the amount assessed against his or their property, as aforesaid, after the expiration of thirty days, the said Board of Public Works shall immediately thereafter issue certificates of indebtedness against the property assessed as aforesaid, which certificate shall bear interest, until paid, at the rate of ten per centum per annum; and until paid, the assessment and certificate shall remain and be a lien upon the property on or against which they shall have been issued; and if the said assessment shall not be paid within one year, the said board shall, upon the application of the holder of the certificate of indebtedness, proceed to sell the property against which the assessment and the certificate exist, or so much thereof as may be necessary to pay said assessment, such sales to be first duly advertised daily for three successive weeks in the regular issue of some newspaper published in the District of Columbia, and to be made by said board at public auction to the highest bidder; and a deed shall be given by the Governor, countersigned by the Secretary of the District of Columbia, which deed shall be deemed and held to be a good and perfect title to any property bought at any sale hereby authorized: *Provided*, That the owner of such real estate shall have the right to redeem the property so sold by paying the amount of the purchase money, and twenty per centum thereon, within two years from the date of sale.

Approved, August 10th, 1871.

On the 23d of November, 1873, the Board of Public Works submitted its annual report to Congress, as required by the organic act. By this report it appeared, *for the first time*, that the cost of improving the Seventh street road was **$174,268.44**, *or more than eight times the sum actually appropriated for it;* and that the assessment against adjoining property was based upon this expenditure of **$174,268.44** instead of upon a cost not exceeding **$20,000**, as required by the appropriating act.

On the 8th of April, 1873, seven months prior to this disclosure of an indebtedness so grossly in excess of the appropriation, the complainant was notified that his farm had been assessed by the Board of Public Works at the rate of $97\frac{46}{1000}$ *per front foot*, or the aggregate sum of **$2,742.04**, and that he was required to pay the same within thirty days thereafter, or, in default thereof, a certificate of indebtedness would be issued, which, together with the assessment, would, by virtue of the act of August 10, 1871, constitute a lien upon said real estate, and subject the same, if not paid within one year thereafter, to sale, at the instance of any holder or holders of the certificate.

The abolition of the municipality created by the act of February 21, 1871, the vesting of its powers in the existing Board of Commissioners, and the antecedent transfer by the Board of Public Works of the certificate of indebtedness against appellee's property to the First National Bank of New York, one of the appellants, are set forth in the bill of review and supplement.

The appellee's original bill invokes partly the preventive and partly the remedial jurisdiction of equity with a view to secure—

1. A judicial determination of the invalidity of the assessment, and the cancellation of the certificate of indebtedness.

2. Removal of the statutory lien and cloud upon the title

to his real estate created by the assessment and certificate of indebtedness, together with the withdrawal and cancellation of the latter.

3. Injunction against sale of appellee's real estate at the instance of any holder of the certificate of indebtedness.

The court below granted a perpetual injunction, and decreed that the certificate should be cancelled, from which decree the appellants prayed an appeal.

GENERAL PRINCIPLES.

It is a well-recognized rule of construction that "any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

1 Dillon Mun. Cor., § 55.
Cooley Cons. Lim., 195, 196 and notes.

Also, that the public powers or trusts devolved by law or charter upon the governing body, to be exercised according to its discretion, are incapable of being delegated to others.

Id., §§ 60, 605, 618.
Cooley Cons. Lim., 204, 117.

And that no sort of ratification can make good an act without the scope of the corporate authority.

Peterson *vs.* Mayor, &c., of New York, 17 N.Y., 449.
Baltimore *vs.* Porter, 18 Md., 284.
Cooley, 196, note 1.
1 Dillon Mun. Corp., 387, note 1, and authorities.

To apply these principles: By the organic act of the late municipal government the control of special improvements was committed to the Board of Public Works. In limitation of its powers, the 37th section provided that its contracts could only be made with reference to pre-existing legislative appropriations, just as every legislative appropriation must, in turn, have been made in contemplation of and in strict accordance with the terms of a proposed and clearly defined contract.

Appropriations made without designation, by the Legislative Assembly, of the specific purpose for which the same was designed, in other words, appropriations made in gross to constitute a general fund for the use of the Board of Public Works, and to be, by it, from time to time, parceled out and applied, *in its discretion*, would have exhibited the exercise of legislative function wholly unauthorized by the constituent act, subversive of its municipal policy, and void. It would have constituted, on the part of the Legislature, an attempted delegation to ministerial officers of powers of specific appropriation, which, by the law of its being, were solely exerciseable by itself.

The measure of the exercise of this power by the Legislative Assembly was determinable, in any given instance, by the amount of money *antecedently* appropriated. Any *subsequent* increase of compensation, was strictly prohibited by the fifteenth section of the organic act.

In the present case the sum of $25,000, less 20 per centum, was the only sum specifically appropriated. This amount, then, so reduced, constituted the full measure of authority for the conduct and cost of the improvement in question.

Again the Legislative Assembly having been entrusted with the authority to ascertain and determine the *manner in which* property adjoining, and to be specially benefited by the improvements authorized by it and made by the Board of Public Works, should be assessed a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, it was incompetent for that body to delegate to others the exercise of this sovereign power.

Whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, *in all cases*, a question of *legislative expediency*.

Dillon Mun. Corp., §§ 596, 618.

The failure to exercise such discretionary power, or the attempt to delegate it is equally fatal to the validity of the assessment.

Id., § 60.
Schofield *vs.* Lansing, 17 Mich., 437.
Culbertson *vs.* Cincinnati, 16 Ohio, 574.
Bl. Tax Titles, 286, 289, 290.

No rule was ever established by the Legislative Assembly for apportioning assessments upon private property. The Board of Public Works arbitrarily assumed to assess upon the basis of per foot frontage and thereby exhibiting an unconstitutional assumption of functions exclusively belonging to the Legislature.

Cooley Cons. Lim., 505–7, 517, 622.

JURISDICTION.

The primary, and, indeed, the only real question involved in this cause, is that of jurisdiction.

"It may safely be affirmed that there is a remedy, by certiorari, prohibition, appeal, indictment, civil action, or in equity, for all injurious abuses of power and all invasions of the legal rights of the citizens subjected to municipal control."

Dill. Mun. Corp., § 728.
See Mitford Eq. Pl., Tyler's edition, p. 207.
Sto. Eq. Jur., §§ 684 and 724.

No right of *appeal* from the proceedings of the Board of

Public Works was ever given, either by Congress or by the Legislative Assembly.

Indictment was wholly inapplicable to the case of the complainant, affording no possible relief.

Of redress by *civil action*, there appear to be two forms, viz: an action of trespass for disturbance of possession or other act of trespass, and an action to recover the tax paid, payment having been made under protest. Neither of these methods were open to the complainant.

1st. The remedy by *trespass* was not available, because no act of trespass has been committed or was contemplated. The issue and transfer of the certificate of indebtedness, and the sale of the property upon application of the holder of the certificate, contemplate no entry upon the premises or other act of trespass, either actual or constructive. True, the purchaser, if he proposes to derive any benefit from his purchase, must, sooner or later, disturb complainant's possession; but when?

See Blackwell on tax Titles, *482, *485.
Burnett *vs.* Cincinnati, 3 Ohio, 73.
Polk *vs*. Rose, 25 Md., 153.

The remedy by trespass is also inadequate, because to await an opportunity for resort to it, the complainant must *absolutely forfeit* his estate should the assessment be held valid. The right of complainant to redeem is, by the act of August 10, 1871, limited to two years from the date of the sale. He cannot compel the purchaser to make entry or bring ejectment within that period. He could, therefore, test the validity of a tax which he believes to be grossly oppressive and unauthorized *only at the peril of* ABSOLUTE CONFISCATION. Hence the *imperative necessity* of equitable interposition.

2d. The party holding the certificate of indebtedness, and demanding payment of the sum intended to be secured thereby, viz: the First National Bank of New York, is a resident of the State of New York. Therefore, suit to recover the amount paid could not be brought, except by resort to a distant and foreign tribunal, *i. e.*, the courts of the State of New York.

The writ of prohibition issues only to a *court.*

Dill Mun. Corp., § 744.
Mealing *vs.* Augusta, Dudley, 221.

Certiorari lies, at common law, only to inferior *courts* and officers exercising *judicial* powers; not only so, but the act to be reviewed must be *judicial* it its nature.

Bacon's Abr. Certiorari, B.
Fitz H. Nat. Brev., 245, A.
Com. Dig, Certiorari, A.
1 Wm. Bl., 233.
People *vs.* Mayor, &c., of N. Y., 2 Hill, 9.
In Matter Mt. Morris Square, *Ibid*, 21, &c.

The Board of Public Works, at least so far as regards their powers in relation to the *roads* of the *District*, was merely a *ministerial* body.

By the organic act, *roads* and *bridges* are omitted from the enumeration of the subjects of exclusive control by the Board of Public Works. On the other hand, their improvement and repair is made in terms the subject of special provision by the Legislative Assembly.

Vide § 22, Organic Act.

"Ministerial officers are those whose duty it is to proceed in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, their own judgment upon the propriety of the act being done."

Flournoy *vs.* Jeffersonville, 17 Ind., 173.

The board was required by the appropriating act—the act of July 10, 1871, heretofore quoted—to "proceed in a prascribed manner," viz., in conformity with the plan of improvements previously submitted, and at a cost not exceeding 20 per cent. less than that estimated in said plan, "without regard to, or the exercise of, their own judgment upon the propriety of the act being done."

In Parks *vs.* Boston, (8 Pick., 225,) the court held that *certiorari* would lie to the mayor and aldermen, because their power was *judicial*, not *ministerial;* and that their power was judicial, because laying out the streets was *discretional*, and its necessity or convenience was *first to be adjudicated upon.*

So, in Baxter *vs.* Taber, (4 Mass., 367,) the court held that the power "*to make contracts in behalf of the county, allow accounts, and issue orders for payment*," are *ministerial*, and that *certiorari* will not lie.

Resort to *certiorari* or *prohibition* was as impossible, physically, as it was legally improper. The thirty days' notice of the fact and amount of the assessment against his property, required to be given complainant by the act of the Legislative Assembly, approved August 10th, 1871, hereinbefore cited at length, was served on complainant on the 8th day of April, 1873, said act requiring the certificate of indebtedness to issue in case default should be made in payment of said assessment, immediately after the expiration of the thirty days; *i. e.*, in May, 1873. Therefore, when, *from the annual report of the Board of Public Works, submitted in November*, 1873, *it first appeared that the assessment was illegal and excessive*, said certificate had already been issued. But *certiorari* will only bring up proceedings still remaining in the hands of the inferior tribunal; it will not remove the warrant in the hands of the collector. (People *vs.* Queens Co. *et al.*, 1 Hill, 195.) *A fortiori* it could not have removed the certificate in the possession of the First National Bank of New York, a foreign corporation, in no manner connected with the municipality.

It is a proposition, self-obvious, that the ministerial agents of a municipal corporation, being merely trustees for the benefit of the citizens subjected to municipal control, are amenable to the jurisdiction of equity, for *violations and abuses of the trust* reposed in them.

Dillon's Mun. Corp., § 736*a*, par. 1.

"It is well established that equity will restrain the sale of an estate, in all cases of trusts and special authorities, where the sale would be inequitable, or operate as a fraud upon the rights of third persons, and especially where the trustee is about to abuse his trust, or the donee his authority. This principle is applicable to tax sales."

Bl. Tax. T., *481.

"So long as those (public) functionaries strictly confine themselves within the exercise of those duties which are confided to them by law, this (chancery) court will not interfere * * * * to see whether any regulation they make is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer treats them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority. While the court avoids interfering with what they do while keeping within the limits of their jurisdiction, *it takes care to confine them within those limits*; if they go beyond the line of their authority, and infringe or violate the rights of others, they become, like other individuals, *amenable to the jurisdiction of this court by injunction.*"

Frewin *vs.* Lewis, 4 Mylne & Craig, 249, 255.
See also Story's Eq. Jur., § 955 *a*.

Courts of equity will entertain jurisdiction in cases of erroneous or illegal assessments, though made by judicial authority, when necessary to prevent irreparable injury or cloud upon title.

Dow *vs.* Chicago, 11 Wallace, 109.
N. Y. Life Ins. Co. *vs.* Supervisors City of New York, 4 Duer, 198.

Blake *vs.* City of Brooklyn, 26 Barb., 302.

Messech *vs.* Board Supervisors Columbia Co., 50 Barb., 190.

Heywood *vs.* Buffalo, 14 N. Y., 537; *et passim.*

WHAT IS IRREPARABLE INJURY?

"In regard to real estate, it is well established that chancery may interpose by injunction to prevent what is considered as destruction. But destruction in the sense used does not mean annihilation. It means no more than that injury which greatly impairs its intrinsic value."

Burnett *vs.* Cincinnati, 3 Ohio, 73.

"The idea that a party ought to stand by and see his property illegally exposed to public sale, and then force the purchaser to bring ejectment to gain possession or to try his title, seems sustained by no good authority. Such a doctrine would not only encourage circuity of action and multiplicity of suits, *but render the title of the real owner comparatively valueless, while the suits at law should be pending.*"

Holland *vs.* Baltimore, 11 Md., 186.

"So long as the owner remains in possession of his estate, the common law gives him no remedy against the person who claims the title to, or attempts to exercise a power over, his property. The claim of title or power may hang over him all his lifetime, clouding his title and preventing a sale, or other enjoyment of his estate, if the person claiming adversely chooses to lie by and not bring his ejectment. This may be ruinous to the true owner, *and therefore a court of equity will invariably interfere in his behalf.*"

Blackwell on Tax Titles, *485.

"Where the owner is in possession of the land at the time the illegal proceeding is about to take place, he has no remedy in a court of law which would indemnify him for a threatened wrong to his title. Should a sale and conveyance take place under the proceedings alleged to be illegal, the owner, because of his possession, could not test their legality by an action of ejectment; and unless the purchaser at the tax sale, or those claiming under him, disturb the possession or commit some act of trespass to the injury of the inheritance, thereby inviting the rightful proprietor to a contest, *the latter would be entirely remediless at law*, and compelled to await the action of the adverse claimant. *Surely, under such circumstances, a court of equity would grant relief upon the familiar principles of action in that court.*"

Ibid., *482.

See also, Story's Eq. Jur., § 711, *a*.

"And the jurisdiction to thus interfere," *i. e.* by injunction, "for the prevention of a cloud upon title, is regarded as pertaining to the well settled powers of equity, which will interfere to prevent such a cloud *as tends to diminish the value of the property or cast a doubl upon the title.*"

High on Injunction, § 367.

WHAT IS CLOUD UPON TITLE?

(I.) The same court which decided Heywood *vs.* Buffalo, in the case of Scott *vs.* Onderdonk, decided at the same term, held that where the conveyance to the purchaser at the tax sale is made, by statute, presumptive or *prima facie* evidence of title, such conveyance may be enjoined by a court of equity, *if it would be in fact void through defect in the preliminary proceedings.* (Scott *vs.* Onderdonk, 14 N. Y., 9.) All the authorities agree that such conveyance would be a cloud upon title.

The statute authorizing sale in the present case under the certificate of indebtedness, provides that a deed shall be given by the Governor, countersigned by the Secretary of the District of Columbia, "which deed shall be deemed and held to be a GOOD AND PERFECT TITLE to any property bought at any sale hereby authorized."

What is meant by *presumptive* or *prima facie* evidence of title? Does it mean *prima facie* in the narrow, technical sense of shifting the burden of proof, or in the more enlarged sense of an apparently valid and effective title?

This will best appear from the reasons of the rule, which are two, viz:

1st. Hazard of loss of the evidence necessary to disprove such apparent title, incurred by supinely awaiting action of adverse claimant, and—

2d. Ruinous effect of such apparent title upon the marketable character and value of the owner's title, his power of sale, or other enjoyment of his estate.

Scott *vs.* Onderdonk, *supra.*
Bl. Tax T., *481.
Holland *vs.* Baltimore, 11 Md., 186.
Burnett *vs.* Cincinnati, 3 Ohio, 73, *et passim.*

These reasons, forming the basis of the rule, are inconsistent with the theory that the jurisdiction of equity depends upon the burden of proof being sustained by the owner of the property, for—

1st. Loss of evidence to disprove the title of a tax claimact, relieved by statute of the burden of proof, would be neither more disastrous nor more to be apprehended than loss of evidence to disprove a *prima facie* case made out by such claimant sustaining the burden of proof, and—

2d. The mere fact that the *onus probandi* technically rests upon his adversary would not sensibly, if at all, relieve the owner from the effect of a cloud upon his title, continued during the pleasure of his adversary, and which he cannot dissipate—an irreparable injury, as declared by the authorities cited *supra.*

" Where the officer has no power to sell, or proceeds to sell without observing the more essential requirements of the statute under which he derives his authority, a court of equity may enjoin the sale. The officer has no right to proceed in such a case, or in such a manner, and the execution of the power, under such circumstances, is calculated *to cast a* CLOUD UPON THE TITLE *of the owner, and to render it* *unmarketable, in the* EQUITABLE SENSE *of that term;* and the effect may be that a legal contest about the right may be postponed *until the evidence of the owner's right may become lost by time or accident.*"

Blackwell on Tax Titles, *481–2.

(II.) A claim, apparently valid upon the face of the record, the defect in which can only be made to appear by extrinsic evidence, is a cloud upon title, which a court of equity will remove.

Ward *vs.* Dewey, 16 N. Y., 519.
Heywood *vs.* Buffalo, 14 N. Y., 534.
Harkness *vs.* Board of Public Works, 1 McA., 121.
Cooley on Taxation, 543, *et passim.*

In making title to complainant's land in the case at bar, the purchaser under the sale would show by the record—

1st. The authority given by section 37 of the organic act (*supra*) to the Board of Public Works to "assess, in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvements authorized by law, and made by them, a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected."

2d. The authority given by the act of the Legislative Assembly of July 10th, 1871, (*supra*,) to said board to make the projected improvement of the Seventh street road.

3d. The authority given to said board by the act of the Legislative Assembly of August 10th, 1871, (*supra*) to make an assessment for the cost of said improvement upon the property adjoining, as provided for in section 37 of the organic act, to issue the certificate of indebtedness against said property, and to make sale of said property under said certificate; and—

4th. The actual assessment, issue of the certificate, sale thereunder, and purchase by the claimant at such sale.

But at no point would the record show the excess of authority by said board constituting the defect in the claim. The claim would, therefore, be apparently valid upon the face of the record of the tax proceedings, the defect in which must be proven by evidence *dehors* the record; consequently, a cloud upon title.

ADDITIONAL AUTHORITIES.

"When an instrument is outstanding against a party, which is void, or an unfounded claim is set up, which the plaintiff has reason to fear may at sometime be used injuriously to his rights, thereby throwing a cloud over his title, it is a well recognized principle that equity will intefere and grant the appropriate relief."

21 Conn., 488; 19 N. H., 91.
3 P. Com., 206; 1 Hemp., 692.
13 Pet., 203; 18 N. Y., 515.
3 Black., 430.

To constitute a cloud upon title which a court of equity will interfere to remove, it is not necessary that there should be a title upon record apparently valid. It is sufficient that there be a deed, valid upon its face, accompanied with a claim of title.

Fonda *vs.* Sage, 48 N. Y., 173.
Vide Lick *vs.* Ray, 43 Cal., 83.

A court of equity will entertain jurisdiction of a bill by the owner of lands, who is in possession, to remove a cloud upon his title, consisting of an illegal tax deed obtained upon it.

1872, Lee *vs.* Ruggles, 62 Ill., 427.

ALLEGED ADVERSE AUTHORITIES.

There has been a series of well-considered cases, in which equity has refused its aid by way of enjoining the collection of a tax. These cases are, principally, Dow *vs.* Chicago, 11 Wallace, 109; N. Y. Life Ins. Co. *vs.* Supervisors City N. Y., 4 Duer, 198; Blake *vs.* City of Brooklyn, 26 Barb., 302; Ewing *vs.* St. Louis, 5 Wallace, 412; Messech *vs.* Board Supervisors Columbia Co., 50 Barb., 190; Ward *vs.* Dewey, 16 N. Y., 519; and Heywood *vs.* Buffalo, 14 N. Y., 537; which cases were closely and critically analysed, and the doctrines deducible from them clearly and accurately expressed by the Court in Harkness *vs.* the Board of Public Works, *supra*, as follows:

1st. "The well settled principle that courts of equity will not interfere by injunction to restrain the enforcement or collection of a tax upon a mere allegation that it is illegal or void, * * * proceeds upon the ground that in all such cases the party injured has an adequate remedy at law."

2d. "With the proceedings and determinations of inferior boards or tribunals of special jurisdiction courts of equity will not interfere, unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari.*"

3d. With the proceedings and determinations of such boards, or tribunals, chancery will also interfere when "enforcement of the tax would lead to multiplicity of suits, or produce irreparable injury."

4th. The declarations of the courts, in the leading cases where the attempt has been made to enjoin taxing officers, that there are reasons of public justice and policy why a court of chancery should not interfere to suspend the collection of public revenue, unless in exceptional cases, are founded upon the necessity of a speedy collection of the taxes as the means of carrying on government.

(1.) In the first place, therefore, if, as has been shown *supra*, this complainant has not an adequate remedy at law, the doctrine of those cases does not reach the case at bar.

(2.) In the second place, the doctrines of those cases relating to the proceedings of *inferior* BOARDS OR TRIBUNALS *of special* JURISDICTION, *i. e.*, those which exercise JUDICIAL functions, review and correction of whose proceedings and determinations, except in the specified case, " must be obtained by the writ of *certiorari*," are not applicable to the proceedings and determinations of ministerial agents, to whom, as shown above, certiorari will not lie. That the Board of Public Works—styled in the case of Barnes *vs.* District of Columbia, 1 Otto, 540, " an ordinary agent of the corporation," viz: " its superintendent of streets "—was, in fact, in respect of the subject of this suit, merely a ministerial body, has been shown *supra*.

That the reference in Harkness *vs.* Board of Public Works, of the doctrines deducible from the cases in question to the proceedings and determinations of judicial bodies, is correct, will clearly appear from an examination of those cases, one by one.

In each of the cases enumerated, as also *in every case* cited in the defendants' brief, in which the interposition of equity was refused, the acts sought to be enjoined were judicial in their character in the first instance, except that of Heywood *vs.* Buffalo. And in that case the assessment, though made by ministerial agents, was subsequently approved by the Common Council and Mayor, such approval being the judicial act of a judicial body—done not " in a prescribed manner, in obedience to the mandate of legal authority," but " with regard to and in the exercise of their own judgment upon the propriety of the act being done." But in the matter of Mt. Morris Square, (2 Hill, N. Y., 21,) the Court say that while a *certiorari* to reverse a mere corporate act, is without precedent; yet, "if it should be altogether destitute of authority, and followed by a judicial decision which would therefore be void for want of jurisdiction, the corporate act might be examinable on certiorari, as incidentally vitiating the latter."

(3.) But supposing what, palpably, is not true, and what perhaps should therefore be excluded from the case altogether, viz: that the acts here complained of *are* judicial in their character, and therefore remediable by *certiorari*—still, should the court be of opinion, either upon the considerations heretofore given, or upon the several other grounds intuitively suggesting themselves, that the inevitable effect of the proceedings sought to be enjoined to render the title of the complainant doubtful and unmarketable during his whole lifetime, or longer, if the tax claimant should please to so long remain inactive, would be "irreparable injury to the freehold," in the sense contemplated by law, *or* that the claim would be apparently valid upon the record of the tax proceeding, the defect arising from excess of authority upon the part of the Board of Public Works requiring extrinsic proof, *or* that the effect of the statutory provision concerning the deed to be given to the tax purchaser would be either in the technical sense, or in that indicated by the reason of the rule, (*supra*,) *prima facie* or presumptive evidence of title, then, notwithstanding such judicial character, jurisdiction will be entertained.

(4.) And, lastly, the doctrine deducible from the cases under consideration are not applicable to the case at bar, because the reasons of public justice and policy, which are the foundations of those doctrines, viz.: the necessity of a speedy collection of the taxes as the means of carrying on government, do not exist in respect to it. In the case at bar the municipal authorities have already received every dollar which could by any possibility come to their hands out of the proceeds of the tax complained of, no matter what may be the decision of the court or the result of the action. This suit is, to every practical intent, a contest between private parties, viz.: the complainant and the First National Bank of New York. If the decision be adverse to the complainant, the proceeds of the sale go exclusively to the bank, and the public have no possible interest nor concern in the matter.

The case of Alexander *vs.* The District of Columbia and The First National Bank of New York (2 MacArthur, 562) involved a consideration of most of the principles under discussion here. It was decided at the next ensuing general term of the court after the decision of this case, and the opinion was rendered by the same justice (MacArthur) who delivered the opinion of the court in Harkness *vs.* The Board of Public Works, *supra*. The facts of Alexander's case were analagous to those of the principal case, only differing from the latter in the circumstance that the assessment sought to be avoided in the former was upon city property. The relief sought is identical in both. The same objections to the jurisdiction of equity were then urged by the counsel for the certificate holder as are now advanced by him before this Court, and were disposed of after a full hearing in the manner following:

> "In the case of Harkness *vs.* The District, 1 MacA., 121, we decided that as a court of equity we would not interfere by injunction to restrain the collection of a tax upon the mere allegation that the tax is illegal or void, and the Supreme Court of the United States has so often decided the same way, that the principle may now be considered settled law. This rule, however, has its exceptions; and whenever the enforcement of the tax would lead to multiplicity of suits, or irreparable injury, or throw a cloud upon the title to real estate, equity will interpose its preventive remedies.

It is not my intention to infringe upon this principle in the present case, but to adjudicate within its limitations. We have not yet passed upon the validity of these certificates, although they have been argued before us many times. In the case just referred to, we expressly declined to do so, where an application was make for a preliminary injunction to prevent the certificates from being issued. The government was then proceeding to enforce the collection of its revenue. But these taxes have been anticipated by the sale of the certificates, and the District cannot now be embarrassed in the speedy collection of its taxes. The question of public policy no longer exists, and if it be true that the costs of the improvements have also been collected from the Government of the United States, the sale of the property cannot take place without casting a cloud upon the title, for which the complainant would have no remedy at law. Under these circumstances, I think the rule which prevents a court of equity from restraining the collection of an erroneous tax is not applicable. The special circumstances exist which would authorize us to interpose for the purpose of preventing a cloud upon the plaintiff's title.

* * * * * *

In the case of Harkness *vs.* The District, already referred to, the court say: In the leading cases, where the attempt has been made to enjoin taxing officers, the courts have declared that there are reasons of public justice and policy why a court of chancery should not interfere to suspend the collection of public revenue, except in exceptional cases. These declarations have nearly all been made in cases of special assessments, and are founded upon the necessity of a speedy collection of the taxes as the means of carrying on government. These considerations have deterred courts of equity from subjecting the collection of public revenue to the hazard and delay of protracted chancery litigation.

This grave question of public policy does not, however, apply to the case at bar, for the certificate in controversy has been sold to, and is now the property of, the First National Bank of New York, and the sale sought to be restrained is for the benefit and at the instance of that institution. The Government has received all it ever will in exchange for that evidence of the tax, and not one dollar to be realized from the sale of this property could be used as the means of public revenue. It is a mere contest between individuals, in which the public have no direct interest. The bank, perhaps, on a collateral proceeding at law, has a claim against the District; but upon that we are not at present called upon to pronounce an opinion, and do not. I am of opinion that the jurisdiction of this court, under these circumstances, will interfere, as in other cases of litigation involving only the rights and interests of private persons. The bank undoubtedly purchased the certificate as a profitable investment, and subject to such disadvantage as tax titles usually inherit, and, seeking to enforce a void instrument, it should not be permitted to cast a cloud upon the title to the property of the complainant."

The cases declaring the doctrines of this court upon the question of jurisdiction to enjoin or prevent the collection of a tax are principally Nicholls *vs.* U. S., 7 Wall., 126; Dow *vs.* Chicago, 11 Wall., 108; Hannewinkle *vs.* Georgetown, 15 Wall., 548, and Taylor *et al. vs.* Secor *et al.*, 2 Otto, 575.

The principles laid down in these cases, though adverse to the taxpayer under the particular circumstances of each, unmistakably sustain the jurisdiction in the case at bar, as will appear upon examination of them.

"The principle"—*i. e.*, immunity of the Government from suit—"is fundamental; it applies to every sovereign power, and but for the protection which it affords the Government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil process the same as a private person."

Nichols *vs.* U. S., 7 Wall., 126.

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may damage the operations of Government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except when it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the claimant, before the aid of a court of equity can be invoked. * * * The equitable powers of the court can only be involved by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law."

Dow *vs.* Chicago, 11 Wall., 108.

"An injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, *or some cause presenting a case of equity jurisdiction.*"

Hannewinkle *vs.* Georgetown, 15 Wallace, 548.

"It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice, nor irregularity, of themselves give the right to an injunction in a court of equity. * * * It is a wise policy. It is founded in the simple philosophy, derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successsully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice."

Taylor *vs.* Secor, 2 Otto, 575.

"We do not propose to lay down in these cases, viz., Dow *vs.* Chicago and Hannewinkle *vs.* Georgetown, any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or mistakes in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

Ibid.

"These reasons, and the weight of authority by which they are supported, must always incline the court to require a clear case of equitable relief before it will sustain an injunction against the collection of a tax, *which is part of the revenue of a State. Whether the same rigid rule should be applied to taxes levied by counties, towns, and cities we need not here inquire; but there is both reason and authority for holding that the control of the courts in the exercise of power over private property by these corporations is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the State.*

"The assessments in the cases before us, of which complaint is made, are all made by the State board of equalization, and, though the taxes are collected by the county authorities, a large part of them go to make up the revenue of the State."

Ibid.

From the foregoing excerps, which fairly comprise the doctrine of the cases decided in this court, it is apparent:

I. That the refusal of injunctive relief, sought upon the ground of the mere illegality, injustice, or irregularity of the tax complained of, rests primarily, if not solely, upon considerations of public policy, to prevent derangement of the operations of government. But, *Cessanti ratione, cessat et ipsa lex.* Where the government has parted with all its interest in the tax, and the suit is, in reality, merely a suit between private persons, viz., the taxpayer and the purchaser of the tax certificate, there are no longer considerations of public necessity, overbearing private hardship and wrong, and the ground of refusal is wholly removed.

II. That, even where considerations of public policy oppose, relief will be granted in four classes of cases, viz.: were the enforcement of the tax would lead to mulplicity of suits, produce irreparable injury, throw a cloud upon title of complainant, or leave him without adequate redress of law. Of these four special grounds of the jurisdiction to relieve, three concur in the case at bar, viz.: irreparable injury, cloud upon title, and absence of remedy at law.

(*a.*) Irreparable injury; see *supra*, p. —.

(*b.*) Cloud upon title, see *supra*, p. —.

(*c.*) Want of remedy at law; see *supra;* Bl. on TAX TITLES, *482. Payment of the tax is demanded, not by the District of Columbia, but by a non-resident corporation, not subject to the jurisdiction of the courts of the district in which the property taxed is situated, and in which the appellee resides. Suppose the tax certificate had been purchased by the Bank of Australia, instead of the First National Bank of New York, could appellants have contented that the appellees should have paid the tax and brought a suit at law in Australia to recover it?

III. That, both upon reason and authority, the same rigid rule which inclines the court to refuse to sustain an injunction against the collection of a tax which is part of the revenue of a State, is not necessarily applicable to taxes levied by counties, towns and cities, "the control of the courts in the exercise of power over private property by municipal corporations being more necessary, and unaccompanied by many of the evils that belongs to it when affecting the revenue of a State?"

THE MERITS.

The actual invalidity of so much of the assessment against the complainant's property as is predicated upon the excess tions of equitable jurisdiction, and that mere errors or mistakes in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

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THE MERITS.

The actual invalidity of so much of the assessment against the complainant's property as is predicated upon the excess of the cost of the improvement above $20,000, is—from the bare statement of the case—clearly apparent.

True, it was argued at the hearing below, that § 37 of the organic act, provides that the board may make assessments for a proportionate part of the cost of the improvement, not exceeding one-third of such cost, " on property adjoining and to be specially benefitted by the improvements authorized by law ; " and that the provision in the same section, that "the Board of Public works shall have no power to make contracts to bind said District to the payment of any sums of money, except in pursuance of appropriations made by law, and not until such appropriations shall have been made," was for the protection of the District, and not for that of adjoining property holders. But, however indefensible this position may be, it is a sufficient answer to say, that the organic act did not empower the board to assess against adjoining property any proportion of the cost of improvements *not* authorized by law, *and there is not and never was any law authorizing any improvement on the Seventh street road beyond a cost of* $20,000.

It has been shown that the only specific appropriation for the improvement of Seventh street road was that contained in the Assembly act of July 10, 1871.

At the suit of certain property owners the operation of this act was suspended, soon after its passage, by the supreme court of the District of Columbia.

To meet obligations already incurred for improvements inaugurated upon the basis established by the " plan," it became necessary, in the estimation of the authorities, to create a temporary fund of $500,000—by anticipating the revenue of the district, from taxes and assessments, during the current year.

Hence the act of August 11, 1871.

Laws D. C., 1871-2, part II, p. 35.

The latter act has been persistently referred to by advocates of the late municipality as providing a separate and distinct appropriation for special improvements from the very liberal allowance of the act of July. The committee of investigation of 1872 would seem to have been led into the error of so regarding it; nor does the learned Counsel for the district hesitate, with singular disingenuousness, to aid in the creation of a similar misconception by this Court.

So far from being an independent appropriation, the $500,000 thus "anticipated" was part and parcel of the $4,000,000 sought to be raised under the provisions of the suspended act of July. Within a very brief time after the latter became operative, by withdrawal of the legal interdict, provision was made by the Legislative Assembly to reimburse the general fund of the District for the $500,000 aforesaid.

This was done by the act of January 18, 1872, the text of which *does not appear* in the appendix to the brief of counsel for the District. It is to be found on page 26, Laws District of Columbia, 1871–2, part III, and is recited in full, *supra*.

Being part of the appropriation of $4,000,000, this $500-000 must be regarded as strictly applicable to the purposes of that appropriation, and to none other. Among these purposes was the road improvement in question upon the basis of an estimated cost of $25,000, *and no more.*

The learned solicitors for the District, and for the bank, have seen fit, at page 19 of the former's brief, and at page 63 of the latter's, to interpolate, in argument, an extract from the report of the investigating committee of 1872. There is propriety in so doing, since the language of the committee is rather that of a special pleader in the cause of his client than of a tribunal sitting in dispassionate judgment.

It is significant that counsel should feel themselves at liberty to resort to the finding of a committee raised to investigate the late municipality within a year of its creation, rather than to the elaborate and exhaustive report of a similar committee constituted for purposes of investigation more than two years later. The reason, however, is obvious. Those considerations, arising from the experimental nature of the municipality, which invoked the clemency of the first, were powerless, in the presence of reiterated abuses, to conciliate the favor of the last. Hence the report of 1874 was the judicial consignment of the corporate entity to that extinction which the law prescribed as the penalty consequent upon violation of the corporate trust.

As the authoritative expression of an exalted judicial tribunal, and not merely to piece out an argument, the following extract from the last-named report is here inserted:

"The second section of the act (of July 10, 1871, Legislative Assembly) prohibited the board from exceeding the estimates submitted in this 'plan,' in the language following:

"'SEC. 2. That in no case shall the said board enter into a contract for any work or improvement the cost of which shall exceed the amount estimated therefor in its aforesaid plan, less twenty per centum of said estimates.'"

"In addition to this restriction the 37th section of the organic act contains the following provision:

"'The said Board of Public Works shall have no power to make contracts or bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made.'"

"It is manifest from this that the intent of the Legislative Assembly was that the board should substantially follow the proposed plan, and should not exceed it in cost unless or until further provision by law should be made by the Legislative Assembly or by Congress, and that Congress absolutely prohibited contracts from being made in excess of or in advance of appropriations.

"The board have expended, and contracted to expend, according to the Governor's showing in his answer, (pp. 464–5,) $18,872,565.76, or more than $12,000,000 in excess of the estimated cost of the proposed plan, and largely in excess of the amount of appropriations made by Congress or by the Legislative Assembly, which could be available as a basis upon which to make contracts. It is claimed by counsel on behalf of the Board of Public Works that the board had lawful authority, derived from Congress and by the Legislative Assembly, to incur these obligations and make the contracts of which they form a basis.

"The committee cannot give their assent to the claim thus made. The committee do not claim that the board were required to furnish to the Legislative Assembly the plan in detail or the estimated cost of proposed improvements as a precedent condition to the making of appropriations; yet good faith required that so great burdens as have been imposed should, in some manner, have received, in advance, legislative sanction.

"It seems plain from the provisions just quoted that Congress, by the organic act, and the Legislative Assembly in the loan act, intended to place upon the Board of Public Works, and all others having the power to expend money in the District, two restrictions, namely: That the aggregate debt should not exceed five per centum of the valuation unless the proposition should first receive the sanction of the people by popular vote; secondly, that said board should not bind the District to contracts for the payment of money except in 'pursuance of appropriations made by law, and not until such appropriations shall have been made;' or, in other words, the people directly were to have a voice in the creation of a debt beyond a fixed sum; and, secondly, through the Legislative Assembly, they should supervise all contracts by first making appropriations therefor."

Sen. R. Dist. of Col., 1 sess., 43d Cong., vol. 1, p. 18.

It is observable that there is less of "warm commendation" here than of stern judicial comment.

The appellee charges, in paragraph five of his bill, that the assessment of any part of the cost of the improvement in question against his property was wholly unauthorized and void.

Section 37 of the organic act declares that the Board of

Public Works "shall assess *in such manner as shall be prescribed by law*, upon the property adjoining and to be especially benefitted by the improvements authorized by law, and made by them, a reasonable proportion of the cost, &c.
Vide, supra.

"It is the duty of the legislature to prescribe the rules on which taxation is to be apportioned."
Cooley's Const. Lim., *506.

No rules of taxation or method of assessment were ever prescribed by law. The method adopted by the board was fixed upon by them without authority, and was most arbitrary and inequitable, viz., an assessment by the front foot against the property abutting.

"To apply it," *i. e.*, the principle of apportionment of taxation among abutters in proportion to frontage, "to the country, or to farm lands, would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that at the very first blush every one would pronounce it palpably unreasonable and unjust."
Washington Ave., 69 Penn. St., 353.

The unsoundness and gross inequality of this rule of apportionment becomes apparent when it is considered that the road in question is the sole public thoroughfare directly connecting the city of Washington with the rich agricultural region of Montgomery county, in Maryland; that it is used principally by the farmers of that section; that lands lying but a short distance from the road, on either side, are exempt from special assessment for its improvements, notwithstanding the fact that their proprietors are benefitted equally with those living directly on its line; that other proprietors, whose lands, although extensive, present a very narrow front upon the road, have but a comparatively small assessment to pay, while those whose farms are less extensive, but of greater frontage, must bear an oppressive burden.

In illustration of the foregoing, we beg leave to quote the following from a printed memorial, framed shortly after the publication of the report of the Board of Public Works, in 1873, by a committee of the taxpayers on this road:

> * * "Many of our neighboring farmers, living but a short distance from said road and equally benefited with us, are entirely exempt from special taxation; others, having very narrow fronts on said road, but large farms back, have comparatively small tax to pay, yet are equally benefited with those, having wide fronts to their farms. We cite a few instances, beginning one mile from the city limits: One small farm of thirty acres of land is taxed $1,282.70; the next adjoining farm of fifty acres, $867; the third farm, eighty acres, is taxed $1,724, while the fourth farm, of seventy-six acres, is taxed but $437. We could cite numerous others equally as unjust, but we think those given above are sufficient to show any sensible person that the assessment per front foot will never apply to farms in the county with any equity."

An assessment thus palpably unreasonable and unjust, and resting entirely upon a gross and unwarranted assumption of power by ministerial officers, is necessarily void.

The organic act expressly referred the manner of making the assessment where it appropriately belonged—*i. e.*, to the law-making power. But *potestas delegata non potest delegari.*

In discussing this point the court, in Alexander *vs.* The District of Columbia, *supra*, use the following well-considered language:

> "The only authority for issuing the special improvement certificates is found in the act of the Legislative Assembly approved August 10, 1871, sess. 1, 31. The third section provides that thirty days after the assessment, if the tax is not paid, the Board of Public Works shall issue certificates of indebtedness against the property assessed, which shall bear interest, and shall remain a lien upon the property; and if the assessment shall not be paid within one year, the

board shall proceed to sell the property, on the application of the holder of the certificate. But it is contended that the Legislative Assembly had no authority to authorize the Board of Public Works to issue such certificates, or to declare them a lien upon real estate, and that therefore the act is null and void in this respect. To determine this question a reference to the thirty-seventh section of the act of Congress approved February 21, 1872, organizing a government for the District, becomes necessary. That section provides that the board shall have power 'to disburse upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected from property-holders in *pursuance of law*, for the improvement of streets, avenues, alleys, and sewers, and roads and bridges, and shall assess in such manner as shall *be prescribed by law* upon the property adjoining and to be especially *benefited* by the improvements authorized by law, and to be made by them, a reasonable proportion of the cost of the improvements, not exceeding one-third of such cost, which sum shall be collected *as all other taxes are collected.*

It is here distinctly declared that the board shall assess, in such manner as shall be *prescribed by law*, upon property benefited by improvements, an amount not to exceed one-third of the cost, and here their express powers end. They have nothing but the function of assessment, unless it is to disburse upon their warrant all money appropriated by the United States or the District, or collected from the property holders in pursuance of law for the improvements. It may be doubted whether a valid assessment was ever made. The Legislative Assembly undertook to "*prescribe by law*," in the act of August 10, a mode of assessing for special improvements, and they enact that a statement of the cost thereof shall be prepared by the Board of Public Works, and that an assessment, based upon said statement, shall be made, as provided for in the thirty-seventh section of the organic act. But no mode is provided for making the assessment itself. Whether it shall be according to the front foot, or upon the superfices of the lots, or according to their different values, are matters left entirely to the discretion of the board, instead of being "prescribed by law." The usual grounds and formalities of assessment and collection are not prescribed in accordance with the provisions of any law. Even if the Legislative Assembly had the power of delegating the mode of assessing to the board under its general power of legislation, it could not do so in regard to the special taxes, because the organic act requires explicitly that the mode of assessment shall be prescribed by settled law. It cannot well be contended that the members of the Board of Public Works could assess according to their own will and pleasure: for the organic act was undoubtedly framed in this respect to prevent the abuse which might result from such arbitrary methods of imposing burdens upon the property of citizens."

It is only necessary in this connection to consider a principle declared in this Court in Taylor *vs.* Secor, strenuously insisted upon by the appellants at the hearing below as applicable to this case, viz.: the just and well-established principle that where an ascertained part of a tax, or a part of a tax capable of being pre-ascertained, is concededly or obviously due, that must be paid, or unconditionally tendered, before complainants seek the aid of the court to be relieved of the excessive tax. The Court says:

"It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due, on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed."

In the cases in which this language was used the complainants, alleging that they had returned sworn schedules of their property, to which other property had been added by the assessors without authority of law; that they had filed sworn statements of the value of their property, which the assessors had increased without authority of law, &c., &c., without either paying or making an actual tender of the tax upon the property returned by them, or its value as sworn to by them, prayed an injunction to restrain collection of the entire tax.

The principle declared obviously requires the concurrence of two conditions of fact to admit of its application, viz.: First, part of the tax must be concededly or evidently due; and, second, the part so due must be capable of being pre-ascertained, or at least approximated, without the aid of the court. Neither exists in the case at bar, for:

I.

No part of the tax is due. The only authority to assess taxes against the adjoining property ever conferred was that given by section 37 of the organic act, which enacted that the board should "*assess in such manner as shall be prescribed by law* upon the property adjoining and to be specially benefited, &c., a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost.

No manner of assessing any part of such cost upon adjoining property was ever prescribed by law. The Board of Public Works, styled in Barnes *vs.* The District of Columbia (2 Otto, 540) "the superintendent of streets" of the municipal corporation, arrogated to itself, without pretence of warrant or authority, the right to assess such cost against against adjoining property in a manner of its own adoption, viz.: the arbitrary, and, as applied to farm lands, the ruinous principle of apportionment among abbuters in proportion to frontage. That no part of a tax so imposed is payable, would seem to be beyond question.

But, if the principle that he who seeks equity must do equity, were capable of such an application as to require as the condition of relief against so much of the tax as corresponds to the cost incurred by the board in excess of the amount limited in the appropriating act, that the appellees should waive the illegality of an assessment made by the board, in the absence of a method prescribed by law, upon its own assumption of authority, to determine a method of assessment, and consent that, within the limit of cost prescribed by the appropriating act, the tax assessed should be regarded due, then—

II.

The part so due is incapable of being ascertained without the aid of the court.

The appropriating act authorizes an assessment of not exceeding one-third of $20,000 against the property adjoining and specially benefited—*i. e.*, a sum not exceeding $6,666.66. The improvement in question is that of a country road about five miles in extent, and the assessment against the single farm of the appellee is $2,742.70, or nearly one-half of the entire amount authorized to be assessed against all the property adjoining the entire road. Even if the mode of assessment pursued by the board had been prescribed by law, as required by the organic act, the utmost sum that could have been lawfully assessed against plaintiff's property would have been that sum which bears the same proportion to one third of a cost not exceeding $20,000 that the frontage of appellee's farm bears to the aggregate frontage of all the farms lying on either side of the road. But upon the appellee's farm, fronting a little more than half a mile upon one side of the road, nearly half of the entire tax authorized to be assessed upon all the property on both sides of the road has been imposed, and a certificate therefor, declared to be a lien upon the farm, issued and placed in the hands of the appellant, a speculative bank in distant State.

The case is wholly unlike that of Taylor *vs.* Secor, where it appeared from the face of the bill that as to an ascertained or ascertainable part of the tax, viz.: so much as related to the property and estimates of value returned by complainants themselves, there could be no contest. Here nothing is concededly due. The whole tax is honestly and *bona-fide* contested. But even if it should be held that there is an equitable obligation upon the apyellee to pay a part of the tax assessed, the proportion so payable is not ascertainable from any data, either conceded, apparent from the record, or in possession of the appellee. The utmost he can do is the offer contained in his bill, "to pay his proportion of the sum appropriated as aforesaid by law for said improvement, and for which contracts were authorized to be made, if the same be justly payable, as soon as such proportion shall be legally ascertained."

Further consideration of this subject of partial invalidity is rendered unnecessary, however, by the admitted payment of $33,515.15 by the Government of the United States for this identical improvement.

> See p. 17 of brief of counsel for the District of Columbia.

Now, this sum is $13,515.15 in excess of the amount appropriated for the entire work, and its payment to the District of Columbia must be held to operate as a full and effectual discharge of all liability on the part of private property-holders on account of the improvement in question.

In the case of Alexander *vs.* The District of Columbia *et al.* a similar payment in excess of the entire amount appropriated for the improvement of New York avenue had been made by the United States. To the argument by defendant's counsel that the complainant should be required, at least, to pay his proportion of the assessment within the limit of the appropriation therefor, the court replied that, the United States having paid the tax, such payment should inure to the benefit of the tax-payer, and relieve his property from the lien created by the previous assessment, and, further, that the certificate holders should present their certificates to the District.

2 MacArthur, 569.

The character of the certificate, payment whereof is sought to be enforced by the appellant bank, may be gathered from the following *fac simile* of others of like issue:

"C."

Certificate of Indebtedness—District of Columbia.

BOARD OF PUBLIC WORKS.

Be it known that the Board of Public Works of the District of Columbia having assessed upon lot number ——, in square number ——, in the city of Washington, in said District, the sum of ——— for its proportionate amount of the cost of improvement upon ——— street —— issue this certificate of indebtedness against said property for said sum, with interest at the rate of ten per centum per annum from the date hereof until paid. Said assessment and this certificate constitute a lien upon said property.

This certificate is issued in accordance with an act of the Congress of the United States entitled "An act to provide a government for the District of Columbia," approved February 21st, 1871. And an act of the Legislative Assembly of the District of Columbia entitled "An act prescribing the mode of assessments for special improvements, and providing for the collection thereof," approved August 10th, 1871; and also an act of said Legislative Assembly entitled "An act amendatory of an act entitled, 'An act prescribing the mode of assessments, and providing for the collection thereof, approved August 10th, 1871,'" approved August 23d, 1871.

Given under our hands in the city of Washington, D. C., this —— day of ———, eighteen hundred and seventy ——.

——— ———

——— ———

Board of Public Works District of Columbia.

Printed on the face in large letters B. P. W.

These certificates represent, not a debt of the municipality, but an alleged obligation of the property owner to pay the sum specifically charged against his property for and on account of its special improvement. In form they are the involuntary appropriation of private property to satisfy the proportionate part of a special assessment. They do not even rise to the dignity of ordinary corporation warrants. There is no process known to the law whereby they can fortify the holder against the consequences of every equitable defense that could affect the original maker. They are wholly unlike, in this particular, the authorized bonds of the municipality issued in aid of a general public improvement.

1 Dillon Mun. Corp., 406.
Cooley Tax, 466, n.
Baldwin *vs.* Ely, 9 How., 580.
Cooley Cons. Lim., 196 and note.

ESTOPPEL.

It is argued that the appellee, having stood by and seen the improvement made, without making any effort to prevent it, is estopped, after the work is done, to refuse to pay for it.

The objection is not applicable to the present case.

Authority to improve the Seventh street road, at a cost not to exceed a specified sum, was given by the act of the Legislative Assembly, July 10, 1871, heretofore quoted; and by the act of August 10, 1871, also quoted *supra*, the assessment against the adjoining property was not authorized to be made until after the *completion* of the improvement.

Therefore, the work having been fully completed, and the expense actually incurred, before it appeared that there was any excess of authority, or want of conformity with the provisions of law authorizing the improvement to be made, the complainant was guilty of no laches, and was not estopped to deny the invalidity of the assessment against his property, when that invalidity became apparent.

The plea of estoppel by laches concedes and proceeds upon the right of resort to the relief sought where there has been no laches.

WAIVER.

It is no waiver of right to object to void assessment that the taxpayer stood by and saw the work done.

Leavenworth *vs.* Lang (1870), 6 Kan., 274.

But the defense mainly relied upon at the hearing below was a supposed ratification by either the Legislative Assembly or by Congress, of the unauthorized acts of the Board of Public Works:

1st. As to the Legislative Assembly—

(a) Had the Legislative Assembly power to so ratify and adopt the unauthorized proceedings of the Board of Public Works as to make a charge and a valid lien upon the property of the complainant?

(b) If the Legislative Assembly possessed such power, was it exercised?

(*a*.) Section 15 of the organic act, is as follows:

"*And be it further enacted,* That the Legislative Assembly SHALL NEVER grant or authorize extra compensation, fee, or allowance to any public officer, agent, servant or contractor, AFTER SERVICE HAS BEEN RENDERED OR A CONTRACT MADE, *nor* *authorize the payment of any claim, or part thereof, hereafter created against the district, under any contract or agreement made within express authority of law;* AND ALL SUCH UNAUTHORIZED AGREEMENTS OR CONTRACTS SHALL BE NULL AND VOID."

But, even without this provision in the organic act, the unauthorized proceedings in question were incapable of ratification by ordinance of the Legislative Assembly, that assembly being only " a large edition of a common council."

Baltimore *vs.* Horn, 26 Md., 194.
Barnes *vs.* Dist. of Columbia, *supra.*
Doughty *vs.* Hope, 3 Denis, 594.

The appellee's prayer for relief is not based upon mere informalities in the assessment. It proceeds upon the want of power in the Board of Public Works to do that whereby it has sought to subject his property to charge.

Vide, Cooley Con. L., 369, *et seq.*

No sort of ratification can make good an act without the scope of the corporate authority.

Peterson *vs.* Mayor, &c., of N. Y., 17 N. Y., 449.

(*b.*) If the assembly possessed such power, was it ever exercised?

The acts of the assembly relied upon for supposed ratification are two, viz.: that of August 10, 1871, heretofore quoted, authorizing the board to make assessments and issue certificates of indebtedness against the adjoining property for the cost of the improvements mentioned or referred to in section 37 of the organic act; as provided for in said section, and the act of May 29, 1873, providing for an extension of the time for the payment of all assessment certificates issued by the Board of Public Works under the act of August 10, 1871.

The latter act clearly has reference *only* to certificates issued "under the act of August 10, 1871," and not to certificates unauthorized by that act. Or as stated in defendants' brief at the hearing below, "the two acts of assembly are connected. The latter act is only operative as an amendment or modification of the former act, without which the latter act could not have come into existence."

But the former act was passed only one month after that of July 10, 1871, authorizing the improvement at a cost not exceeding $20,000, and *twenty-six months* before November, 1873, when *for the first time* it appeared, from the annual report of the Board of Public Works, then submitted, that said board *had exceeded its authority by nearly eight times the entire amount of the appropriation.* And the amendatory act of May 29, 1873, was, also, passed *five months previously* to the submission of the annual report, and, consequently, before the Legislative Assembly were apprised of the unauthorized proceedings of the board. It was, therefore, physically impossible for the legislature to have contemplated in those acts a ratification of those unauthorized proceedings.

But had there not been an interval of twenty-six months between the so-called ratifying act and the first official cognizance of that which was to be ratified, could that act, or the act amendatory of it, be so construed as to ratify the proceeding complained of?

"The court will not attempt to mould the language of an act for the sake of an apparent convenience, without the clearest evidence of a corresponding intention in the legislature."

6 A. & E., p. 7.

"As regard must always be had to the subject matter, so, in construing a statute, we must never lose sight of its object and intent."

Potter's Dwarris on Stats and Const'ns, p. 202.

"It has been hitherto propounded, that words are to be taken in their ordinary sense; it now requires to be added: *and not to be extended beyond it, to comprehend a case within the supposed meaning of the legislature.*"

Ibid., p. 203.

"They," *i. e.* the judges, "are not (as the most learned members of a learned body best know) to *presume* the intentions of the legislature, but to *collect them* from the words of the act of Parliament; and they have nothing to do with the policy of the law. This is the true sense in which it is so often impressively repeated, that judges are not to construe statutes by equity or views of policy, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness."

Ibid., p. 204.

"I cannot speculate as to the intentions of the legislature; the words appear to me to be quite plain."

Samuel *vs.* Nettleship, 3 Q. B. Rep., 188.

"*The office of interpretation is to bring a sense out of the words, and not to bring a sense into them.* The spirit of a law may be referred to in order to interpret words admitting of two meanings; *but never to extend a law to a case not within its fair meanings.*"

Beebe *vs.* Griffin, 14 N. Y., 244.
McClusky *vs.* Cromwell, 11 N. Y., 593.

But both the act of August 10, 1871, and of May 29, 1873, *expressly declare their objects and intents; nor do those objects and intents refer in the remotest degree to the ratification of any unauthorized and illegal acts whatsoever.* Nor is there in either of those acts, a single clause, word, or expression indicating any knowledge, or consciousness even, upon the part of the legislature that the amount of the appropriation for this or any other of the improvements authorized by the act of July 10, 1871, had been exceeded, or that the authority of the Board of Public Works had been in any respect transcended.

2d. Congress.

The act of Congress relied upon as a ratification of the unauthorized contracts and proceedings of the Board of Public Works is that of June 20, 1874.

By section fifteen of the organic act Congress declared that all unauthorized contracts and agreements should be null and void. Independently, therefore, of the principles of interpretation and construction above cited, it must require language of no uncertain meaning to show an intention upon the part of Congress to repeal this enactment, and to do what it had forbidden the Legislative Assembly ever to do, and this, too, independently of any question as to the power of Congress to ratify acts which are null and void, so as to make them a charge and a lien upon the property of the private citizens.

But the language of the act in question does not simply fail to convey, however remotely, any such purpose or intention as that contended for by the defendants. On the contrary, it is expressly declared that "said Commission," (*i. e.*, the Commissioners of the District of Columbia, by said act created and empowered, "to exercise all the authority now *lawfully* vested in the Governor or Board of Public Works of said District . . . . *subject to all the restrictions and limitations now imposed by law on said governor or board*,") in the exercise of said power or authority, *shall make no contract, nor incur any obligation other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District, to the execution of existing legal obligations and contracts*, and to the protection or preservation of improvements existing, or commenced and not completed, at the time of the passage of this act."

This point was likewise passed upon by the court in Alexander *vs.* the District; and in relation to this very act the court say:

"But it is said that Congress has recognized the validity of this act of the assembly; and we are referred to the act of Congress abolishing the District government, the second section of which provides that nothing therein contained shall affect any provisions of law authorizing or requiring a deposit of certificates of assessment with the sinking fund commissioners of the District. This is not to be considered as a ratification, judicially or by Congress, of the action of the assembly in regard to these certificates. The same act provides that *all taxes lawfully assessed* shall be collected, and the power of anticipating the taxes by the sale of the evidence thereof is expressly prohibited. It cannot, I think, be successfully maintained that an act of Congress which prohibits these certificates, and declares that only taxes which have been lawfully assessed can be collected, is a ratification of the assembly legislation, so as to take away the right of the tax payer to defend his property from sale upon lien which had been previously void. The other alleged ratifications by acts of Congress are mere implications, and are liable to the same disposal."

1 MacA., 567.

The act of June 20, 1874, was the product of the very tribunal which sat in judgment on the Board of Public Works. Is it conceivable that Congress designed to perpetuate the iniquities which led to the condemnation of the board? Besides, these very suits were at the time pending, and must have operated to evoke the expression of the assumed congressional intent had such in fact existed.

Gerry *vs.* Stoneham, 1 Allen, 319.

As to the Act of June 19, 1878.

Since this case was argued and submitted at the last term of the court Congress has passed the following act:

An Act to provide for the revision and correction of assessments for special improvements in the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioners of the District of Columbia be, and they are hereby, directed to enforce the collection, according to existing laws, of all assessments for special improvements prepared under an act of the Legislative Assembly of August 10, 1871, as charges upon the property benefited by the improvements in respect to which said assessments were made: *Provided*, That upon complaint being made to the Commissioners, within thirty days from the passage of this act, of erroneous or excessive charges in respect to any of said assessments which remain unpaid, said Commissioners are hereby authorized to revise such assessments so complained of, and to correct the same; and where certificates of assessment have been issued, they shall issue to the holder of such certificate a drawback certificate for the amount of such erroneous or excessive charges, which certificates shall be received at any time in payment of assessments for special improvements, and they shall be redeemed in the manner prescribed for the redemption and purchase of certificates, as provided by an act of the Legislative Assembly of May 29, 1873, entitled "An act for extending the time of payment of special assessments, and for other purposes," after the provisions for the purchase and redemption of certificates named in the act shall have been fully carried out.

Approved June 19, 1878.

It is claimed on behalf of the appellants that its effect, by necessary implication, is to confirm the existing laws to which it relates, and to retroact upon and make valid, as of the dates of their respective levy, the assessments to which it refers.

This claim it is our purpose, in concluding this brief, to disprove. Nor do we admit that it is at all competent, upon mere construction or by implication, to award to similar legislation, under like circumstances, a retrospective operation upon property rights of individuals or pending controversies in the courts.

What is the manifest purpose of the act in question? As indicated by its language it is certainly not to establish a rule of civil conduct of universal application. On the contrary, it is directed in terms to the Commissioners, and being so directed it is a mandate upon them to do—what? Simply that which, without it, they were bound, officially, to do, viz: to enforce the collection, according to existing laws, of all assessments for special improvements, etc. If, without this act, the Commissioners, on proceeding to enforce the collection of the assessments, found that, because of the absence of jurisdiction in the Board of Public Works to [illegible] ~~enforce~~ them, or on account of any other essential defect in existing laws, the assessments were void and incapable of being collected, it is not easy to see how the mere superaddition of a congressional command to collect, unaccompanied by any attempt to supply these fundamental defects in existing laws, can operate, by relation back, to validate the assessments.

Again, Congress, by this legislation, undertook to add, and has added, nothing to the pre-existing law on the subject of assessments. On the contrary, they are permitted to remain unaltered. But it has been shown that pre-existing laws did not warrant the imposition of the assessments, because they failed to furnish the rule of apportionment—a jurisdictional prerequisite to any levy made by the Board of Public Works. In order, therefore, to maintain for this act the effect claimed it is necessary to show that it has supplied, retroactively, not merely informalities in the assessment levy, but the absence of power to make it. This, too, it is sought to do by a bald appeal to supposed legislative intendment, after repeated adjudications by the courts upon the validity of these assessments in cases wherein the construction of the existing laws was a principal subject of consideration.

If, in the absence of express words of ratification, the act in question cannot be regarded as a direct retroactive affirmance of pre-existing laws or assessments, it is not easy to perceive how, on the other hand, its mandate upon the Commissioners to assess, according to existing laws, is susceptible of being tortured into a declaration of the construction to be placed, retrospectively, on those laws. Still less that such construction shall be contrary to the one which the courts of the District, in successive well considered, cases have thought proper to adopt.

It is plain that, to sustain their position, opposing counsel are reduced to the necessity of defending Congress in the assumed exercise of judicial power; *i. e.*, the power to determine retrospectively, and in opposition to the finding of the courts, what the existing law is, not of declaring what the law shall be. This is to assail the constitutional division of governmental powers, and to encroach upon the jealously regarded prerogative of the courts. Nor is it at all clear that an intent, however unmistakeably expressed on the part of Congress, to effect such an object could be sustained on constitutional grounds. *A fortiori*, will a court, when called upon, as in the present case, to infer ~~apply~~ and give effect to a legislative intent so derogatory to its powers, decline to do so.

But, aside from all considerations of constitutional limitations upon legislative power, it is not easy to perceive how, from this statute, an intent can be gathered to construe pre-existing laws in view of the fact that such construction is not in terms even hinted at; or, indeed, how the act can be regarded otherwise than as constituting a mere mandate, determinable, in its operation upon the Commissioners, by the intrinsic soundness or unsoundness of the existing laws which they are thereby called upon to execute.

If, however, the act in question is to be regarded as the exercise, by the legislature, of its taxing power, that will furnish no argument for giving it a retroactive operation further than as it may be held to sanction the improvements already made, and to adopt, as of the date of its passage, the pre-existing assessments. Certainly the act affords no pretext for holding that it was framed for the purpose of affecting the rights of parties to pending suits; and, if it did, for the reasons already stated, we do not conceive that this court would or could give it a retroactive operation.

Every statute in derogation of the rights of property, or that takes away the estate of a citizen, ought to be construed strictly.

Sharp *vs.* Speir, 4 Hill, 78.

It is in the general true that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of Parliament is that *nova constitutio futuris formam debet imponere non praeteritis.*

Bacon's Abr. Stat., C.

Statutes can never be applied retrospectively by mere construction.

Jarvis *vs.* Jarvis, 3 Edw., 462.
Whitman *vs.* Hapgood, 10 Mass., 437.
Somerset *vs.* Dighton, 12 *Id.*, 383.
See also Couch *qui tam vs.* Jeffries, 4 Burr, 2460.

"It may, in general, be observed of retrospective laws of every description that they neither accord with sound legislation nor the fundamental principles of the social compact."

Patterson, J., in Calder *vs.* Bull, 3 Dall., 388.

Chase, J.:

"The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundations of the legislative power, they will decide what are the proper objects of it; the nature and ends of legislative power will limit the exercise of it."

Id.

"In Ogden *vs.* Blackledge, 2 Cr., 272, the Supreme Court of the United States considered the point too plain for argument that a statute could not retrospect so as take away a vested right."

Kent, C. J., in Dash *vs.* Van Kleeck, 7 John R., 508.

It is a first principle that all laws should operate prospectively.

1 Bl. Com., 44.

The language of the statute of frauds is "that from and after the 24th of June, 1677, *no action shall be brought* whereby to charge any person upon any agreement in consideration," &c. Yet it has been uniformly held that it would not retrospect so as to take away a right of action to which a party was before that time entitled, but applies only to promises made after the 24th of June, 1677.

Per Thompson, J., in Dash *vs.* Van Kleeck, *supra.*

See, for a very strenuous indorsement of the reasoning of Judge Kent in the last cited case, the opinion of Judge Story in Society, &c., *vs.* Wheeler.

2 Gall., 139.

It is always competent to change an existing law by a declaratory statute: and where it is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made, for this would not only be the exercise of a judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would, in effect, sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.

Cooley Cons. Lim., *94 and note.

An expository act is destitute of retroactive force, because it is an act of judicial power, and is in contravention of the ninth section of the ninth article of the Constitution, which declares that no man can be deprived of his property unless "by the judgment of his peers or the law of the land."

Reese *vs.* William Tell Association, 39 Penn. St., 137.
See also Salters *vs.* Tobias, 3 Paige, 388.

That construction which will produce a consequence so directly opposite to the whole spirit of our legislation ought to be avoided, if it can be avoided without a total disregard of those rules by which courts of justice must be governed.

Postmaster General *vs.* Early, 12 Wheat., 146.

The Legislature may pass a declaratory act, which, though inoperative in the past, may act in future.

Id., 148.

As the Legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the Legislature permits to remain in force. "To declare what the law *is, or has been*, is a judicial power; to declare what the law *shall be* is legislative." One of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial. If the Legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it not according to the judicial but according to the legislative judgment.

Cooley Const. Lim., *94, *95.
Dash *vs.* Van Kleeck, 7 Johns., 498, per Thompson, J.
Ogden *vs.* Blackledge, 2 A., 272.
Lambertson *vs.* Hogan, 2 Penn. St., 25.
Governor *vs.* Porter, 5 Humph., 165.
People *vs.* Supervisors, &c., 16 N. Y., 424.

The Legislature cannot retrospectively construe statutes and bind parties thereby.

Cooley Cons. Lim., *368 *et sec.*

The American authorities are quite uniform on the retroactive effect of statutes. The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared, and courts will apply new statutes only to future cases unless there is something in the very nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation; and, although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein.

Wren *vs.* Oakley, 11 Paige, 403.
Butler *vs.* Palmer, 1 Hill, 325.
Johnson *vs.* Burrill, 2 id., 238.
Dash *vs.* Van Kluck, 7 John., 499.
Berley *vs.* Rampacher, 5 Dun., 183.
Calkins *vs.* Calkins, 3 Barb, 306.
Sackett *vs.* Andross, 5 Hill, 334.
Vidder *vs.* Alkenbrack, 6 Barb., 328.
People *vs.* Supervisors, &c., 10 Wend., 362.
Van Rensselaer *vs.* Livingston, 12 id., 49.

In the case of Warren Manufacturing Company *vs.* The Ætna Insurance Company, in the United States circuit court of Connecticut, Thompson, J., in an opinion, reported in 2 Paine's C. C. R., 517, says, in relation to a law purporting to have a retrospective operation:

" But the law in question, although it purports on its face to have a retrospective operation, cannot be considered as having such effect and operation. It is a sound general principle that no statute ought to have a retrospective effect. It is the general rule that a statute takes effect from its date when no time is fixed, and it cannot upon sound principles be admitted, that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute partakes in its character of the mischiefs of an *ex post facto* law, and when applied to contracts or property would be equally unjust and unsound in principle as *ex post facto* laws when applied to crimes and penalties."

See note 9, page 162, Potter's Dwarris on Statutes, as also the admirable statement of principles applicable to the construction of retrospective statutes, limitations upon legislative powers in passing them, &c., in the text, at pp. 162 to 166.

The following recently-decided cases are directly in point, and the reasoning of the several courts is deemed to be decisive of this branch of the present case:

"Though it (the act of 1872) should be held to validate the assessments, it could only render them operative from the time of its passage, for it must be upheld, if at all, as an exercise of the power of taxation, whereby the legislature adopted the apportionment and assessment previously made, and imposed the tax directly upon the property affected, in accordance with such previous assessment."

People *ex rel.* Williams *vs.* Dayton, 55 N. Y., 367.

"The legislature has power to pass curative acts by which the various acts and proceedings of the officers and board charged with the levying and assessing of taxes are rendered valid and legal, notwithstanding that *errors* and *irregularities* have intervened. But when the officers or tribunal have *no power* or *jurisdiction* the act is void, and subsequent legislation cannot cure the defect."

People *vs.* Goldtree, 44 Cal., 323.

"An act attempting to validate a void assessment on a lot in a city for a street improvement, if it has that effect, does not, by relation, make the assessment valid as of the date when it was levied, but only validates it at the date of the passage of the act."

Reis *vs.* Graff, 51 Cal., 86.
People *vs.* O'Neil, *Id.*, 91.
Same *vs.* Kinsman, *Id.*, 98.
Same *vs.* McCain, *Id.*, 360.

In conclusion, permit us to repeat that the improvement in question constituted one of the class of works committed by Congress to the exclusive jurisdiction and care of the Legislative Assembly, (vide sec. 67 and 247 Rev. St. D. C., *supra*;) that the Legislative Assembly, having determined upon the construction of the improvement, and intrusted its execution to the Board of Public Works, thereby exhausted all judicial functions appertaining to it, and from that time forth the conduct of the improvement, under the administration of the assembly's agent, became and was purely ministerial, subject, not to the operation of a *writ of certiorari*, but, as in the case of other and similar trusts, to the jurisdiction and powers of a court of equity; that the board itself, correctly enough, viewed the exercise of their authority in no other light, as is evident by the fact, developed at page 83 of their annual report, filed as an exhibit with the original bill, that they actually devolved upon another ministerial officer of the corporation, to wit: the surveyor, the task of making the assessment, and that the Board of Public Works, being clothed with the general power to make assessments, and to issue certificates predicated thereon, acted, in the present instance, apparently within, but actually, as appears, extrinsically, (*supra*,) without the scope of their authority.

The plaintiff's claim to the jurisdiction of equity being established, his right of redress is clear. Of this there is scarcely the pretence of denial on the part of the defendants. The equities presented in the original bill are plain, conclusive, paramount. The case is exhibited of one who, being in possession of his land, demands to be discharged of and from liability on account of an unjust, oppressive, and confiscatory assessment, in the imposition of which he has had no voice, as to the extent of which he was without contemporary knowledge, or the means of knowledge, and the effect of which, as prescribed by statute, will be to occasion the sale of his property, and the formation, in the equitable sense, at least, of a cloud upon his title, to be averted only by resort to the preventive agencies of a court of equity.

The improvement is that of a country road, more than five miles in length, bordered on either side by farm lands, disproportioned in value to the excessive expenditure, and but sparsely settled. As if to divest themselves of every presumption in favor of the proper discharge of their minterial duties in the conduct of this improvement, the board of Public Works, not content with overstepping the limits of the appropriation made for it, did not hesitate in levying the assessment to usurp the legislative function of prescribing the rule of its apportionment, and this they did on the grossly inequitable basis (as applied to country lands) of per foot frontage.

We therefore pray the Court to affirm the decree of the court below.

Respectfully submitted,

T. A. Lambert,
R. T. Merrick,
Of Counsel for Appellee.

In the Supreme Court of the United States.

Nos. 62 and 531.

George Mattingly et al., *Appellants*,

vs.

The District of Columbia et al., *Appellees.*

First National Bank of New York et al., *Appellants.*

vs.

Abner C. P. Shoemaker, *Appellee.*

It is hereby stipulated that all acts of the late Legislative Assembly of the District of Columbia, relating to the questions at issue in the above-entitled cause, shall be admitted at the hearing, as if the same had been specially pleaded.

Lambert & Darlington,
Solicitors for Appellants in No. 62, *and Appellee in No.* 531.
William A. Cook,
Solicitor First National Bank, New York.
W. G. Riddle,
Attorney, District of Columbia.